

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HODELL-NATCO INDUSTRIES, INC.,

08CV2755

Plaintiff,

vs.

June 29, 2015

8:30 A.M.

SAP AMERICA, INC., ET AL.,

Volume 11

Defendants.

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE DONALD C. NUGENT
UNITED STATES DISTRICT JUDGE
AND A JURY

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MONDAY, JUNE 29, 2015, 8:32 A.M.

3

THE COURT: You guys wanted to talk to me,
somebody wanted to talk to me?

4

08:41:07

5

MS. LUARDE: Yes, Your Honor.

6

Good morning.

7

THE COURT: Good morning.

8

MS. LUARDE: Your Honor, SAP intends to

9

present two experts, I assume today and tomorrow. The

08:41:31

10

first one is a Mr. Osborne. A few points about

11

Mr. Osborne. He actually is SAP's damage expert, and he

12

is -- he was presented to us during the life of this case

13

solely as a rebuttal witness to Dr. Kennedy.

14

As you know, Your Honor, Dr. Kennedy's

08:41:53

15

testimony has been excluded in this case, and so,

16

frankly, there's no reason for Osborne to proceed.

17

His entire report addresses solely

18

Dr. Kennedy's damage calculation. It would be highly

19

prejudicial to us if he were allowed to testify. We have

08:42:10

20

no idea what the man's going to say. He's never prepared

21

a report addressing Otto Reidl's damage calculation and

22

it's a complete mystery to us what he might actually

23

testify to on the stand.

24

It would be extremely confusing for the

08:42:24

25

jury and yet very highly prejudicial to us.

1 As for Otto Reidl, Otto Reidl actually
2 testified and was deposed over a period of two days, and
3 during the course of that two days, he testified and
4 presented his entire damage calculation to opposing
08:42:40 5 counsel, so Otto Reidl's testimony here was not a
6 surprise.

7 If they wanted, you know, Osborne to
8 address Reidl and Kennedy, they could have done that.
9 Kennedy has been excluded. There's just no point to have
08:42:58 10 Osborne testify at all.

11 The second expert, Mr. Hilliard, Hilliard,
12 much of his opinion has been gutted by Dr. Wells, and
13 he's left with -- I'm sorry -- Judge Wells. It's been a
14 long couple of weeks, I apologize. Much of his opinion
08:43:23 15 has been gutted by Judge Wells, and he's left with
16 three --

17 MR. CARNEY: Two, two opinions.

18 MS. LUARDE: Two? Two opinions. And
19 there's not been a motion for reconsideration filed by
08:43:39 20 SAP to allow the additional opinions to come in, and we
21 anticipate that only those two opinions will be the
22 subject of the testimony.

23 MR. STAR: Your Honor, good morning.

24 I'll address very quickly the Hilliard
08:43:52 25 issue and then my friend, Mr. Kelleher, will talk about

1 Mr. Osborne.

2 We don't intend to go outside the bounds of
3 Judge Wells' ruling with respect to Mr. Hilliard. That's
4 quite simple.

08:44:05 5 THE COURT: Okay.

6 MR. KELLEHER: Good morning, Judge.

7 When we received the motion with respect to
8 Mr. Osborne, it was 9:00 o'clock last night, and a little
9 surprised, to say the least.

08:44:17 10 This Court issued a motion in limine
11 deadline, and that deadline has passed. Both sides filed
12 motions by that deadline. They didn't say anything about
13 Mr. Osborne then.

14 Mr. Osborne has been on every single
08:44:30 15 witness list SAP has ever submitted in this matter.
16 Dr. Kennedy was excluded in October of 2004. That was
17 nine months ago. Last night was the first time --

18 THE COURT: 2004 was nine months ago?

19 MR. KELLEHER: 2014, excuse me. It's been
08:44:45 20 a long week or two.

21 That was nine months ago, and they waited
22 until last night to file it.

23 But more importantly, this motion ignores
24 the history here, and the history that I'm talking about
08:44:59 25 is that Mr. Osborne, in his report and his opinions,

1 responded to what Dr. Kennedy said because at the time we
2 were told that, quote, the ultimate conclusion of what
3 the damages are would come from an expert.

4 And that's what we've been told this entire
08:45:17 5 case, Judge. And this goes back all the way to the very
6 beginning.

7 The Plaintiff filed initial disclosures.
8 They're supposed to disclose their damages computation.
9 They didn't do that. What they did was they disclosed a
08:45:32 10 category of damages and a number, but no computation.
11 And what they said in that initial disclosure was, "Don't
12 worry, we're going to hire an expert and he's going to
13 tell you all about that."

14 Well, then we issued interrogatories and we
08:45:43 15 said, "Please tell us all about it, all about these
16 categories. What is your computation? What is your
17 theory that underlies this category and this number or
18 these categories and these numbers?" And again in
19 response to our interrogatories, they objected and they
08:45:55 20 said, "Don't worry, it's going to come by way of an
21 expert."

22 Then we issued a 30(b)(6) notice. One of
23 the topics was damages. They objected again and said,
24 "Don't worry, it's going to come by way of an expert."

08:46:06 25 Notwithstanding that objection, they

1 designated Mr. Reidl to testify to "Categories and
2 estimates" of the damages.

3 Well, we took his deposition, and when
4 Mr. Star actually started asking him questions, specific
08:46:20 5 questions about his damages calculation, he objected no
6 less than five times, said he was not the damages expert.
7 And then when Mr. Star asked him specific questions,
8 Mr. Lambert stood up and objected and he said, "We
9 object. We're going to get an expert to come to the,
08:46:38 10 quote, ultimate conclusion of what the damages are."

11 And when I was thinking last night at
12 9:00 p.m. at what I might say today, I thought I might
13 bring a dictionary in. I ultimately felt that was not
14 necessary because I think everyone knows what "the
08:46:53 15 ultimate conclusion" means.

16 So what happened? They filed Mr. Kennedy's
17 report, and then Mr. Osborne responded to the substance
18 of that report because that was the ultimate conclusion
19 of what their damages were.

08:47:08 20 Fast-forward in time, Judge Wells knocks
21 out Dr. Kennedy's record. We have a final pretrial
22 conference. This was before the trial that was supposed
23 to go in November. And what we said was, "Hey, just so
24 we're all clear, we think that, Hodell, you guys are
25 limited to your out-of-pockets because your damages

1 expert who has these theories of, you know,
2 non-out-of-pocket damages just got knocked out."

3 And to our surprise they said, "Oh, no, no,
4 we intend to put forward all of these theories through
08:47:35 5 Mr. Reidl."

6 So we filed a motion and it focused on
7 their failure to disclose and it reached all the way back
8 to the initial disclosures, the interrogatories, all
9 those things that I mentioned, and we said we don't know
08:47:48 10 what the man's computation is because it was never
11 disclosed, and because we were told at all times that,
12 quote, the ultimate conclusion of what the damages were
13 would come through through an expert.

14 Then we filed another motion and this is
08:48:01 15 the motion that's currently pending before the Court, and
16 this was on the basis of to preclude Mr. Reidl from
17 providing these damages opinion on the basis of 701 and
18 702, and that's the motion that's currently before the
19 Court.

08:48:16 20 But the point behind all of this is -- and
21 this gets me to my last point -- is what Mr. Reidl is
22 doing is, in many respects, the same thing that
23 Dr. Kennedy was trying to do. They have been -- their
24 damages expert got knocked out, and they're trying to
08:48:27 25 backfill those expert opinions with the lay opinions of

1 Mr. Reidl. And how do we know that? Well, let's just
2 look at the topics that Dr. Kennedy opined on.

3 He opined on lost productivity. What
4 metric did he use? Pounds shipped per employee.

08:48:46 5 He opined on a lost opportunity at Pacific
6 Coast & Bolt. Now, I understand Your Honor has excluded
7 that as speculative, but that's the same opinion
8 Mr. Reidl attempted to offer.

9 What else did Dr. Kennedy discuss in his
08:49:00 10 report? He talked about return on investment. That's
11 the same topic that Mr. Reidl talked about.

12 So if you look at -- oh, he also talked
13 about lost sales -- this is Dr. Kennedy -- lost sales,
14 lost orders and lost customers. And I read, I think for
08:49:15 15 the first time last night, Hodell said that, "Well, we're
16 not actually claiming lost orders and lost sales and lost
17 customers," and I'm fine with that, but that's not the
18 evidence that their witnesses have put to the jury.

19 I mean, Mr. Kevin Reidl told the jury that
08:49:31 20 the computer issues impacted sales. That was on
21 June 15th, the first day of trial. It's on Page 205,
22 Lines 1 through 11.

23 Mr. Clarke, who testified a few days later
24 on June 19th, he told the jury that there's lost sales
08:49:45 25 and lost orders from Union Metal for a month. He

1 couldn't quantify it, but he told the jury that in
2 response to specific questions from counsel.

3 And so that's what Mr. Osborne addresses.

4 And so the notion -- and I'll just wrap it
08:50:01 5 up, Judge -- the notion that Mr. Osborne should be
6 precluded from testifying because his report was couched
7 as a response to Dr. Kennedy is disingenuous and
8 extraordinarily myopic.

9 Take the word "Dr. Kennedy" out of
08:50:21 10 Mr. Osborne's report, and he responds to the same subject
11 matter on the same topics that Mr. Reidl testified to
12 here in court.

13 The only thing, Judge, that I can think of
14 as I stand here that perhaps Mr. Osborne discusses or
08:50:36 15 intends to discuss on the stand that was not from a
16 subject matter perspective discussed in Dr. Kennedy's
17 report is this -- is this notion about overhead and labor
18 costs.

19 But there's a reason for that, and the
08:50:52 20 reason is that they keep changing their theory. I mean,
21 we were all in court the first day Mr. Reidl testified
22 when he said, in response to Your Honor's question and
23 others, that he had to add additional employees from 2006
24 to 2008.

08:51:07 25 And then we all went home for the night,

1 and he came back in the morning and his theory had
2 changed. And now he was saying that, "Oh, no, no, no,
3 actually what happened was we had to -- some people left
4 and that's what I meant when I said additional
08:51:21 5 employees."

6 And you saw how frustrated Mr. Star was,
7 and he asked Mr. Reidl point blank, he said, "Sir, this
8 is the first time that you're saying anything about this
9 natural loss of employees and replacing them," and with
08:51:35 10 all due respect, Mr. Reidl prevaricated and he
11 dissembled, and I thought it was clear to everyone, that
12 he was essentially agreeing that this was the first time
13 that he was offering that testimony.

14 And then, of course, he admitted that these
08:51:50 15 documents were never produced. They had the documents in
16 terms of who these people, these mythical people, were,
17 they had the documents, they were responsive, he should
18 have produced them, he said all that, and he said he
19 didn't produce them.

08:52:03 20 But the point here really is they keep
21 changing their theory, Judge, and the notion -- let me
22 step back. If we had to file a new expert report every
23 time Hodell changes their damages theory, we would have
24 had to file four or five expert reports by now.

08:52:19 25 And it's not fair and not with the purpose

1 or the letter of the Rules to require us to file a new
2 damages theory just because the Plaintiff keeps changing
3 their theory.

4 I mean, at the end, I get it, there's some
08:52:28 5 gamesmanship and lawyering, but at the end of the day,
6 they're meant to throw the pitch, and we're meant to have
7 a chance to swing at it. And we keep trying, and they
8 keep changing it. And now they are saying, "Oh, well,
9 because we hid the ball so well, you can't put your
08:52:43 10 damages expert up there."

11 And so --

12 THE COURT: Let me ask the Plaintiff,
13 because I thought I would get something this morning
14 about what are your damage claims.

08:52:56 15 MR. LAMBERT: About the damage claims in
16 general?

17 THE COURT: Yes. What do you think you are
18 allowed to argue to the jury as to what your economic
19 damages are?

08:53:05 20 MR. LAMBERT: The economic damages are the
21 loss -- the increased overhead expense from lost
22 productivity.

23 THE COURT: All right. How do you quantify
24 that?

08:53:17 25 MR. LAMBERT: That was testified to by

1 Mr. Reidl. That was completely consistent with his
2 deposition testimony regarding excess employees needed to
3 ship for the volume of product.

4 THE COURT: Bear with me a second.

08:53:32 5 Increased overhead expense, and how is that
6 quantified?

7 MR. LAMBERT: It was quantified by looking
8 at the amount -- the number of employees required to ship
9 a given volume of product under SAP Business One and the
08:53:46 10 number of employees that Hodell historically would have
11 used to ship that same volume of product under FACTS.

12 So real numbers. Those two scenarios were
13 compared. Mr. Reidl said that the -- under Business One,
14 they had to use the equivalent of 27 additional employees
08:54:05 15 to run the entire business over that 25-month period, and
16 that he attributed the cost per employee for that
17 25-month period, so the total -- what he did was he
18 calculated what is the cost per employee for Hodell's
19 entire business because that's how the system impacted
08:54:28 20 it.

21 THE COURT: Okay. What else?

22 MR. LAMBERT: Okay. That was just a
23 multiplication factor, right?

24 THE COURT: Got you.

08:54:33 25 MR. LAMBERT: Then he calculated the

1 out-of-pocket expenses which were relatively
2 straightforward.

3 THE COURT: That was, like, for sending
4 people to training?

08:54:40 5 MR. LAMBERT: Well, that's a different
6 category.

7 The out-of-pockets were like what he paid
8 for the licenses, what they paid for hardware, for
9 related items. There was a compendium of checks and
08:54:51 10 things like that that Mr. Reidl verified on the stand
11 that added up to somewhere in the neighborhood of
12 \$840,000 or \$890,000.

13 THE COURT: Okay. And what else?

14 MR. LAMBERT: There was the lack of return
08:55:07 15 on investments, so Mr. Reidl clearly testified on the
16 stand that making an investment in Business One, it was
17 promised to him that -- and we've seen it in the
18 marketing literature, that there would be increased
19 efficiency, increased productivity, and things like that
08:55:24 20 over and above what they had under FACTS.

21 So I just want to be clear, the first
22 category I talked about regarding the lost productivity
23 damages was just the declination in productivity from
24 where they were under FACTS to where they got to under
08:55:41 25 Business One.

1 So they went down, right?

2 The return on investment was they were
3 promised to go up in efficiency. That measure of what
4 they were promised as far as going up in efficiency.

08:55:56 5 THE COURT: Okay.

6 MR. LAMBERT: What they expected, and he
7 discussed how he got to that number.

8 And then the training, travel, and expenses
9 related to getting their employees up to speed on how to
08:56:07 10 use the software. Obviously that was wasted when they
11 had to throw the system out.

12 And then the increased bank debt expense
13 that they had to incur to acquire Business One, to -- to
14 acquire replacement software when Business One had to be
08:56:32 15 thrown out, the decline of productivity that effected.

16 Their business impacted their financial
17 performance and obviously the natural result of that is
18 your interest rate shoots up. That's what Mr. Reidl
19 calculated on the stand.

08:56:47 20 THE COURT: Okay.

21 MR. LAMBERT: I just want to be clear about
22 the difference between Otto's testimony and Dr. Kennedy's
23 is that Your Honor recognized that, I believe, on Friday
24 Dr. Kennedy was calculating doing a lost profits
08:57:05 25 analysis. That's not what Mr. Reidl did.

1 It's always been clear and it's been clear
2 in the briefing, we're not trying to tabulate lost
3 customers or lost sales. That's never been what we've
4 been trying to calculate. If we could do that, if the
08:57:20 5 evidence would have allowed us to parse out particular
6 lost customers and tabulate it, we would do that and
7 there would be no such thing as a before and after
8 analysis.

9 But, you know, what we've done is tabulate
08:57:33 10 the effect on the profitability of the company which is
11 different than lost profits in the sense that you can
12 make money, right, you could have a good year, but if the
13 failure of the software caused you to have -- even if you
14 had a great year, if the failure of the software causes
08:57:51 15 you to lose money that you should have earned, should
16 have made, then that's still damage. That's still damage
17 that's been inflicted on the company. That's what they
18 calculated.

19 THE COURT: Okay. You can call your
08:58:04 20 witness, and you can address those issues.

21 MR. STAR: Thank you.

22 Your Honor, may I address one thing while
23 we're on this subject?

24 As Mr. Kelleher pointed out, this has been
08:58:14 25 like a game of Whack-A-Mole. Last night Hodell filed a

1 brief pertaining to the damages. I'm going to read from
2 it. Here's what they said about this lost profits, lost
3 productivity, whatever they're trying to call it.

4 They said, "Hodell has never contended that
08:58:27 5 it had to add or replace a specific employee or set of
6 employees as a result of the failing Business One
7 implementation." They said that last night.

8 This next thing I'm going to read is
9 Mr. Reidl's testimony from Thursday morning last week,
08:58:41 10 after he had a night to consider what he had discussed
11 the day before. He was asked: "How are you claiming
12 that Hodell was harmed due to decreased productivity?

13 "Answer: During this period, 2007 and
14 2008, we had at least 27 people leave the employ of the
08:58:57 15 company, and during that time, our pound volume declined
16 and we would not have replaced those people if SAP
17 Business One had performed as it should have. And we
18 would not have had those employees because our pound
19 volume declined. And the number of people that we had to
08:59:15 20 replace times the cost of those people for a 25-month
21 period amounted to a \$2.6 million cost increase."

22 I don't know what to say here. Frustrated
23 beyond belief. I mean, they have just shifted and
24 changed. They're now arguing against their own witness's
08:59:37 25 testimony under oath.

1 Very clearly, their theory here on this
2 lost productivity/increased overhead claim has been, as
3 Mr. Reidl testified at his deposition years ago, they had
4 to add employees. We finally got them down to the point
08:59:53 5 to say he admitted their head count wasn't any different.

6 Then what did he say? "Oh, we lost people
7 through natural attrition, and I was just going to have a
8 lower head count and be more efficient because we were
9 doing less work, but I had to replace those folks with 27
09:00:09 10 other people."

11 And now, as he said on the witness stand
12 here last Thursday, his calculations takes those 27
13 unidentified unknown people and multiplies them by an
14 average yearly cost to come out to \$2.6 million.

09:00:24 15 So whatever explanation you just heard
16 here, with all due respect, it just, it defies what
17 they've been saying, what their own witness testified to.

18 THE COURT: I really don't think we need to
19 say any more. You can call your witness and we'll deal
09:00:40 20 with it.

21 MR. MILLER: Your Honor, if I may, just to
22 be clear.

23 THE COURT: You just can't help yourself.

24 MR. MILLER: Well, this is near and dear to
09:00:47 25 my heart.

1 Mr. Osborne, just by the very nature of
2 having to come in here and respond to these productivity
3 fairy dustings is prejudicial to SAP, meaning the jury
4 should not have even heard Otto Reidl present this idea
09:01:00 5 that "You weigh success and it's not measured in dollars
6 and, therefore, give me the 2.6 million," and confuse
7 them to the point where they think maybe that guy is
8 smarter than them and he ought to get the 2.6 million.

9 And us having to bring Mr. Osborne in and
09:01:16 10 attempting to debunk something that is contrary to logic
11 is ultimately prejudicial to SAP because I think the
12 jury's going to be confused. They don't exactly
13 understand the theory that the Plaintiffs have. They
14 don't exactly understand our response to it because
09:01:30 15 Plaintiffs' theory is confusing in the first place. And
16 they're as confused or more confused as we all are,
17 right?

18 And then what are they going to do?
19 They're just going to be left with the number 2.6 million
09:01:43 20 and maybe they decide, I don't know, split it or give it
21 all to them because they don't understand it. I mean,
22 this is prejudicial that we've gotten this far. And it's
23 the problem, it goes back to that 911 exhibit that we've
24 looked at multiple times.

09:01:57 25 Mr. Reidl, as a lay witness, wants to

1 testify that up is down and that these dollar successes
2 that compare the 2008 year to the 2006 year should be
3 disregarded in his universe.

4 And he's not a physics professor and he
09:02:16 5 can't come in here and tell the jury that up is down;
6 again because it's confusing, it's going to be
7 prejudicial, and it's prejudicial for us to have
8 Mr. Osborne respond.

9 And one other point, Your Honor, on the
09:02:27 10 return on investment issue, this keeps coming up and we
11 spend a lot of time on productivity and we tend not to
12 get back to the return on investment issue, but it's over
13 a million dollars that they're seeking for this, and
14 it's -- it's a hogwash theory that shouldn't be in front
09:02:43 15 of the jury either.

16 They have an unauthenticated barely
17 readable page that says ROI calculator, and you can't
18 even understand what it says. There's an X axis and a Y
19 axis and there's some suggestion, if you read the
09:03:00 20 language you can read, that in certain areas there may be
21 successes that customers recognize and they take that and
22 they go, "Oh, okay, we're now entitled to whatever we
23 think we wanted in terms of an investment return."

24 And the calculation that Mr. Reidl does,
09:03:18 25 it's got nothing to do with the X axis and Y axis in this

1 marketing document. They basically just pick it up and
2 say, "Look, this document exists in the universe and,
3 therefore, here's what we wanted to return on this
4 investment and give it to us."

09:03:35 5 And if you look at, like, the whole trial,
6 the two weeks we've been here so far and you look for
7 what testimony existed on this issue, that's it.

8 Mr. Reidl says, "Oh, it's in the marketing materials.

9 Can you show us? Yeah." And he picks up a single page,

09:03:52 10 not the front, not the back, just a single page, you can
11 barely read it, it's not authenticated, and he says, "You
12 see that X axis and the Y axis? That meant to me you can
13 get a return." And you look at the text, and it doesn't
14 say what he says. It says in certain areas, you might
09:04:09 15 get a return.

16 But he doesn't follow that. He doesn't say
17 "I relied on that and I want that." He says, "I got my
18 own theory. This is what we wanted to get on a return
19 all along."

09:04:19 20 And there's no evidence that SAP ever
21 promised that they could have what they say they want.
22 And it's another example, and they only have a couple
23 damages categories, the only one that's left that they
24 really ought to be permitted to present to this jury is
09:04:33 25 out-of-pocket, which probably includes the training,

1 that's why Your Honor asked it that way, because for some
2 reason, they separate those. And in my mind, maybe it
3 makes some sense because they don't have the invoices for
4 the training and maybe it's only the 842 or whatever it
5 is.

6 But this case on damages, productivity
7 should be out. Out-of-pocket's okay. They don't have
8 support for the training stuff. The investment returns,
9 this fairy idea with this single page, and the bank debt
09:05:03 10 expense is the same. It's not -- when we got a two-week
11 trial, when we got down to damages, they fumbled and
12 there's no testimony in the record that supports the idea
13 that, "Oh, my banker didn't like me," ignoring that it
14 was the worst economic time in the history of the country
09:05:19 15 or at least our lifetime.

16 And they just said, "Our bank raised the
17 interest rate. We think it was B1, give us that money."
18 And they don't even document, like, with bank records or
19 anything what it was. If you isolate the testimony, you
09:05:36 20 just look at it and go this can't go to the jury. The
21 jury will be confused and they could actually think that
22 somehow this group knows better and they ought to just
23 concede to them and figure that's what the damages are.

24 And in a case that's as exhausting as this
09:05:49 25 and after all the work we've done, we can't do that.

1 MR. LAMBERT: Your Honor, if I may.

2 THE COURT: We don't need to.

3 (Jury in)

4 (Proceedings resumed in presence of the
09:09:26 5 jury as follows:)

6 THE COURT: Good morning, ladies and
7 gentlemen. Have a seat.

8 Sorry for the delay. It was my fault. We
9 had a criminal matter up here. Shouldn't probably tell
09:09:33 10 you this because we're involved in a case that involves
11 software, computers, and things like that, but with the
12 advent of these personal computers, we're getting an
13 awful lot of cases where there's child pornography
14 throughout the Internet, and when people get charged,
09:09:54 15 there's an enormous penalty for possession of child
16 pornography.

17 And lots of times, you know, the FBI and
18 the other investigating agencies are pretty hip on how to
19 find all this stuff and locate things on computers,
09:10:10 20 whether you scrub your computer or not, that's why Hilary
21 doesn't want to give her server over. They can find this
22 stuff on the servers.

23 And so anyway, we had a case before you
24 came in where -- and usually it's the situation the
09:10:27 25 person has no other criminal record, and they get caught

1 up in this. And because there's a whole -- probably
2 shouldn't tell you investigative secrets -- but there's a
3 whole organization of law enforcement officers that have
4 a special place where they are and monitor all this stuff
09:10:44 5 going on on the Internet, and they know these different
6 sites and they can tell whether people are storing or
7 transferring or whatever else they do. It's amazing.

8 But when somebody gets charged with this,
9 they go get a search warrant and do all this
09:11:01 10 investigation on the computer, then when the lawyer has
11 the case, the defense lawyer, he's bewildered and say how
12 do I figure all this out and they need extra time, so.
13 All right.

14 With that, you may call your next witness.

09:11:19 15 MR. STAR: Your Honor, we call Brooks
16 Hilliard.

17 BROOKS HILLIARD

18 of lawful age, a witness called by the DEFENSE,

19 being first duly sworn, was examined

09:12:07 20 and testified as follows:

21 THE COURT: Please have a seat.

22 Could you tell us your full name and then
23 spell your last name?

24 THE WITNESS: My name is Brooks Louis
09:12:25 25 Hilliard, H-I-L-L-I-A-R-D.

1 THE COURT: Thank you.

2 Yeah, go ahead.

3 MR. STAR: Thank you, Your Honor.

4 DIRECT EXAMINATION OF BROOKS HILLIARD

09:12:29 5 BY MR. STAR:

6 Q. Good morning, Mr. Hilliard. How are you?

7 A. Good. How are you today?

8 Q. I'm doing very well.

9 Would you please introduce yourself to the
09:12:44 10 jury, tell them a little bit about what you do?

11 A. Yes.

12 My name is Brooks Hilliard, I'm an IT
13 consultant based in Phoenix, Arizona. I've been in the
14 computer industry since the 1960s, starting out as a
09:12:57 15 developer, then working in marketing and management roles
16 for various computer companies.

17 I've been on my own as a consultant from
18 1980 to the present.

19 Q. Let's just go through your educational background.

09:13:12 20 Can you tell the jury a little bit about
21 where you went to school, what kind of degrees you have?

22 A. Certainly.

23 I did my undergraduate at MIT in Cambridge,
24 Massachusetts. I was on the Dean's List there, majored
09:13:27 25 in mechanical engineering and also learned about

1 computers while I was there, although they didn't have a
2 computer science major at the time.

3 And then when I graduated from there, I
4 went -- was accepted at Harvard business school, and I
09:13:44 5 went immediately to Harvard business school in the fall
6 of '68. My time there was interrupted by three years in
7 the military, and, but, I came back and graduated with an
8 MBA degree in 1973.

9 Q. Great. Let's go through your history and
09:14:04 10 experience working in the computer IT software industry.

11 You said that you started doing that back
12 in the 1960s and you described your education a little
13 bit.

14 Let's focus on what you did in that
09:14:13 15 industry after you finished at Harvard in 1973.

16 A. Okay.

17 Well, the development work was still
18 undergraduate work. Once I got my MBA degree, I started
19 working in marketing and sales in executive positions for
09:14:35 20 various computer and software companies from 1973 to '80.
21 I was a product manager, I was a salesperson, I was an
22 executive, and I had responsibility for various computer
23 hardware and software products.

24 Q. And in that realm, did that include setting up
09:14:55 25 marketing campaigns and marketing messages to potential

1 customers?

2 A. It did, yes.

3 Q. And could you describe that for us a little bit?

4 A. Well, as the head of product marketing, I would
09:15:08 5 look at the various -- the demand for various products.
6 I would help specify the products, make sure -- work with
7 the development people to make sure they were developed
8 to meet the needs, and then once we had a working
9 product, would put together a marketing campaign for how
09:15:27 10 our salespeople or our sales agents, our sales
11 organization, would go out and market the product, who
12 the target markets were, what the capabilities were that
13 we would emphasize, and so forth.

14 Q. And help us understand, for what kind of products
09:15:48 15 were you doing it?

16 You mentioned software and hardware. Can
17 you give us some specifics on the companies that you were
18 working for back at that time?

19 A. Sure. I worked for a company called Linolex which
09:15:59 20 was acquired by 3M. I had the responsibility for a small
21 business computer system that we marketed through
22 independent software vendors that would develop software
23 for particular industries. I was in charge of going out
24 and recruiting the software vendors, helping them -- and
09:16:22 25 there was, of course, software that we had on our

1 computers that supported the application software that
2 they were selling.

3 But I would help them put together their
4 marketing plans, who they were going after, and how we,
09:16:34 5 as the supplier of the base systems, hardware and
6 software, could support them.

7 Q. Okay. Now, this case, of course, involves a
8 product called Business One and some add-on products, but
9 generally referred to as enterprise resource planning or
09:16:49 10 ERP software.

11 Do you have experience with respect to ERP
12 software?

13 A. When I was with the computer companies, essentially
14 Linolex's customers were developing what we would today
09:17:04 15 call ERP software. It was application software that
16 would handle the full spectrum of capabilities that a
17 business might need.

18 In general, they developed software for
19 particular industries, so their software would be
09:17:20 20 specialized in that way, and we had different sales
21 organizations with different industries.

22 Q. So is it fair to say that you were actually working
23 with the kind of software we know today as ERP software,
24 before that kind of label was put onto that product?

09:17:32 25 A. Absolutely, yes.

1 Q. Okay. And just so we can have a point of
2 reference, what was the date that you were first starting
3 to work with the kind of software that today we would
4 call ERP software?

09:17:42 5 A. That would be the early to mid -- to mid-seventies.

6 Q. Okay. And since that time, can you give us an
7 overview of what experience, if any, you've had ongoing
8 with regard to ERP software?

9 A. Yes. I continued to work in that, in that
09:18:02 10 environment, for my whole career in working for larger
11 computer companies, and then in 1980, I went out on my
12 own as a consultant with the idea of working for
13 businesses, helping them understand their needs and
14 helping them find computer software and supporting
09:18:22 15 systems to -- that would meet those needs.

16 The term "ERP" really didn't come into use
17 until the 1990s, but the software my clients needed and
18 that I helped them first specify what they were looking
19 for and then find applications that would meet those
09:18:43 20 needs, was full -- the full spectrum of business
21 applications, what today we call ERP software.

22 Q. Okay, great. When, if ever, did you first become
23 familiar with any ERP software from SAP?

24 A. Probably during the late 1990s and early 2000s.

09:19:07 25 Q. Okay. We'll explore that in some more detail.

1 You mentioned your experience working with
2 various ERP products.

3 Can you give the jury an overview of the
4 different vendors' products that you've worked with or
09:19:17 5 consulted on over the years?

6 A. Sure. As a -- as a consultant, I didn't represent
7 any computer software. I was entirely independent. I
8 didn't implement the software because very often the
9 vendors themselves implemented it, and I didn't want to
09:19:36 10 have a conflict of interest there.

11 But I looked at software from companies
12 like People Soft and J.D. Edwards and Oracle, all of whom
13 are now owned by Oracle, as well as companies, Great
14 Plains and Profit 21, FACTS, all what today we call ERP
09:19:59 15 software, that was marketed to do the full spectrum of
16 capabilities.

17 So SAP, Oracle, Microsoft, and a lot of
18 smaller companies that were particularly oriented towards
19 specific industries that my clients were in.

09:20:18 20 Q. All right. Let's break it down a little bit.

21 So you said you started your own consulting
22 outfit in the early 1980s.

23 Let's start at a high level and then talk
24 about what you actually do as a consultant in this space.

09:20:32 25 First off, from a high level, how many

1 different consulting engagements, if you can tell us,
2 have you had through your own business over the years?

3 A. Of the type of consulting that I've just described
4 working with clients and helping them find systems, over
09:20:46 5 200.

6 Q. Okay. And are those, some of those, ongoing
7 engagements that you continue to help clients over the
8 years, or are these all one-and-done projects?

9 A. Some of each. Some of each.

09:20:59 10 I still do those from time to time. I have
11 one that I expect to start working on shortly.

12 Q. Okay. Now, help the jury to understand. I'm sure
13 the specifics of each engagement are different, but as a
14 general matter, if you're engaged as a consultant for a
09:21:15 15 company interested in ERP software, what generally are
16 you asked to do and what do you do in that role?

17 A. It's really -- well, in general, it's a five-step
18 process. Sometimes companies will engage me to do just
19 one or two steps of the five steps, but for almost all of
09:21:32 20 the 200, I'd say 180 of the 200-plus, it would be a
21 five-step process.

22 The first step would be go in and meet the
23 people at the company, the key people in each, in each
24 operational area, and learn what their needs are, what
09:21:50 25 they want the system to do, and how they want whatever

1 system to do that to be better than what they're doing
2 now.

3 And then as a result of that, I put
4 together what I call a requirements document or an RFP
09:22:10 5 that describes their required functions, something that
6 we could then send to potential suppliers so they could
7 see whether their software meets that.

8 Second thing I do, and after we've got that
9 all, everyone's reviewed that and we understand what
09:22:30 10 the -- and everyone's agreed what the system needs to do,
11 then go out and find systems that specialize in doing the
12 types of things they need, be that distribution -- and
13 probably, I've had more distributors as clients than any
14 other industry sector, manufacturing, could be
09:22:53 15 professional services firms like a law firm or CPA firm,
16 I've worked for publishing firms, I've worked for radio
17 stations, a wide variety of industries.

18 But go out and find software that will meet
19 those needs.

09:23:08 20 Q. So let me just interrupt you so we can keep it
21 flowing a little bit. I'm sorry.

22 So if I have this correct, part of what you
23 do as a consultant is you'll meet with the customer and
24 gather their requirements to figure out what they need
09:23:19 25 from the software?

1 A. That would be step one, yes.

2 Q. Okay. And then part of that process is to actually
3 look at different software products from various vendors
4 to determine whether that product is something that
09:23:33 5 your --

6 A. Potentially. That would be step two.

7 The third step is I pick out the ones that
8 are most promising and then we go into depth on those.

9 We get them to come out and make presentations to us, do

09:23:44 10 demonstrations, respond to the requirements document
11 point by point to make sure that their software will meet
12 it, or if it doesn't, how they're going to meet those
13 needs and so forth. That third step really culminates in
14 a decision after reviewing the options and my helping the
09:24:03 15 client make the decision as to which one is going to be
16 the best fit for them.

17 Q. Okay. And you said there's two more steps in your
18 five-step process.

19 Can you go over those briefly?

09:24:12 20 A. Sure. The fourth step is negotiating contract with
21 the vendor. Now, I'm not a lawyer, but I -- I know the
22 computer-related aspects of the contract better than most
23 companies' lawyers do. So I work with the client's
24 lawyer there.

09:24:28 25 And then the fifth step is --

1 Q. Let me interrupt you on that last step.

2 When you say negotiating the contracts, are
3 there typical contracts that you would find in an ERP
4 setting?

09:24:37 5 A. Yes.

6 Q. And tell us what those would be in your experience?

7 A. There's generally a license agreement for the
8 software. There's a development agreement if there are
9 any add-ons to be developed.

09:24:53 10 And very often, there's a maintenance
11 agreement to maintain the software after it's
12 implemented.

13 Q. Okay. And in your experience as a consultant,
14 you've had occasion to assist clients with negotiating
09:25:06 15 those particular kinds of documents in the ERP space,
16 correct?

17 A. I have. Hundreds, well over a hundred times. In
18 fact, I've had a few clients that have engaged me just
19 for that one step alone.

09:25:20 20 THE COURT: Mr. Miller, excuse me, could
21 you take that down so we can get a clear view of the
22 witness?

23 Sorry, didn't mean to interrupt you.

24 MR. MILLER: Not at all, Your Honor.

09:25:32 25

1 BY MR. STAR:

2 Q. The fifth and final step in your process, could you
3 describe that quickly?

4 A. Yes.

09:25:38 5 As I say I don't do the implementations but
6 the fifth step is monitoring the implementation, making
7 sure things go smoothly and there are always a few bumps
8 in the road. I always expect and tell my clients to
9 expect it will not be entirely trouble-free during the
09:25:54 10 implementation process, and so my job at that point is to
11 make sure that when some concern comes up, that we figure
12 out what it is, we address it, and we find a reasonable
13 way for the -- that's acceptable to my client and
14 acceptable to the computer company to get it resolved so
09:26:14 15 that we ultimately have a successful implementation.

16 Q. Now, help us understand. These consulting
17 engagements, you said there's about 200 of them that
18 you've done and employed this five-step process, is that
19 right?

09:26:25 20 A. That's correct.

21 Q. Now, those engagements, are they where you're hired
22 and working on behalf of the software company or as you
23 say the computer company, or are you actually working and
24 hired on behalf of the end user company, the companies
09:26:38 25 like Hodell who might actually employ the software in

1 their business?

2 A. In a hundred percent of those, I would be hired by
3 the end user company. And my job is to make sure that
4 they know what they need and we find something that does
09:26:53 5 what they need.

6 Q. Okay. So in your consulting world, you're
7 consulting 100% of the time with end user companies like
8 Hodel who actually acquire software in representing
9 their interests?

09:27:06 10 A. That's correct.

11 Q. Okay. Now, you mentioned in your description
12 there, your experience with consulting for distribution
13 companies.

14 Can you explain that a little bit more and
09:27:15 15 help us understand what you've done in the past?

16 A. Sure. Actually I have a background in distribution
17 that goes back to when I was a kid.

18 My dad owned a machine tool distribution
19 company in Hawthorne, California, and I was -- used to go
09:27:32 20 there and take inventory from the time I was shorter than
21 this stand here. And so I understood.

22 And then I worked on what we call the order
23 board, taking orders from customers who would call in in
24 my dad's company. So I have a background in distribution
09:27:51 25 that goes back well before my college education.

1 As a consultant, of those 200-plus clients,
2 I would say 20 to 30 of them were distribution companies
3 ranging in size from, you know, relatively small to
4 multi-state distribution companies with branches all
09:28:16 5 over.

6 Q. Okay. And for those, just so we're clear, for
7 those 20 or 30 distribution companies, you actually were
8 hired as a consultant for those companies in the
9 selection and monitoring of the implementation of their
09:28:29 10 ERP software?

11 A. In general, the full five-step process I described
12 to you.

13 Q. Now, of course, this case is dealing with Business
14 One and can you tell the jury whether you have any
09:28:39 15 particular experience with consulting for any clients on
16 the selection or implementation of Business One software
17 particularly?

18 A. Yes. Back in the early 2000s, I was working with a
19 combined manufacturing/distribution company where we
09:28:57 20 looked at Business One and were about to choose it and
21 then the company, unfortunately, went through some
22 financial reverses and didn't acquire it, but we looked
23 quite closely at it.

24 It was the one that I felt was the best
09:29:09 25 fit. The decision is always my client's decision. I

1 help them understand what the pluses and minuses are of
2 each of the options, but that was the option that was in
3 my view the best.

09:29:28 4 Q. Other than that one experience with Business One,
5 have you had other occasions to review Business One,
6 other than outside of the context of this case, I should
7 say, have you had other occasions to review Business One
8 or have you consulted with other companies regarding
9 Business One software?

09:29:42 10 A. Yes. We've looked at Business One, I've looked at
11 Business One for other clients. I've had clients by the
12 way that have chosen the FACTS software. I've had
13 clients that chose the Profit 21 software. In
14 that -- the one where we were about to or I was about to
09:30:01 15 recommend Business One was the one where it was the best
16 fit and where we looked at it the closest.

17 Q. Okay. Now, part of what you do also is testify as
18 an expert witness in cases like this, is that right?

19 A. Yes, I do.

09:30:18 20 Q. And for how long have you been doing that, sir?

21 A. Well, my -- my first experience was back in the
22 1980s, but I really didn't do much of that until the late
23 nineties.

24 I had an occasional case here and there,
09:30:36 25 and from the late nineties to the present, it's phased

1 from less than half to half to most of my practice today.

2 Q. Okay. And over the years, you have a number of how
3 many times you've been engaged in a legal dispute like
4 this?

09:30:53 5 A. Yeah, it's a little over a hundred.

6 Q. Okay. And in those situations, are you engaged by
7 the software provider, by the implementer, by the
8 customer?

9 A. I'm always engaged by the law firm.

09:31:06 10 Q. Okay.

11 A. But it's the law firm generally -- well, I guess
12 over the years, it's probably been maybe 60% law firm for
13 the customer and 40% for the -- for the vendor. These
14 days about half and half.

09:31:27 15 Q. And when you're engaged in these matters, are
16 you -- are you providing your own objective views or are
17 you constrained in some way to provide views that others
18 want you to provide?

19 A. I won't take an engagement where I'm going to be
09:31:46 20 constrained.

21 I always want to make sure that the law
22 firm that's engaging me wants to know what actually
23 happened, what the real truth is. And there have been
24 occasions when I've told them they don't have a
09:32:01 25 particularly good case.

1 Q. Okay. Let's talk about your engagement here.

2 You were engaged by our law firm?

3 A. Yes.

4 Q. In this matter?

09:32:10 5 Okay. Were you given any particular
6 assignment or any particular instructions on what to do?

7 A. Well, yes. I was.

8 Q. And describe that for the jury.

9 A. What you asked me to do was to look at the
09:32:24 10 circumstances relating to the acquisition and
11 implementation of the Business One software at
12 Hodell-Natco and to try and determine what went wrong
13 causing Hodell-Natco to be dissatisfied with what they
14 were getting and to figure out what caused that, and to
09:32:47 15 let you know.

16 Q. Okay. Were you also asked to take a look at the
17 opinions expressed by Helmuth Guembel?

18 A. I was, yes.

19 Q. Okay. And in any of that, were you directed or
09:32:59 20 constrained in any way to come up with any particular
21 opinions or were you directed to answer only specific
22 questions, or were there any restrictions put on what you
23 were going to do?

24 A. No.

09:33:11 25 Q. Okay. And you ultimately did express opinions in

1 this matter through a written report?

2 A. I did, yes.

3 Q. And were those opinions yours and yours alone?

4 A. They were.

09:33:20 5 Q. And did you reach those opinions in a reasonable
6 degree of professional certainty?

7 A. Yes, I did.

8 MR. STAR: Your Honor, we would -- we would
9 proffer Mr. Hilliard as an expert with respect to ERP
09:33:35 10 software products in general and with respect to the
11 Business One software used in this matter, with respect
12 to how these products are marketed and implemented, and
13 with respect to the causes and investigation behind
14 performance problems with software and hardware.

09:33:51 15 THE COURT: Go ahead.

16 MR. STAR: Thank you.

17 BY MR. STAR:

18 Q. Before I jump into it, let me just cover the last
19 thing I mentioned here, the hardware.

09:34:00 20 You did mention that you've been working
21 with hardware. Just give us a sense of what you've done
22 in the, I'll just call it the computer industry, right?
23 You've worked with hardware and software.

24 Tell us what you've done with respect to
09:34:16 25 hardware over the years.

1 A. Well, I actually started out as a software
2 developer on small computer systems back in the sixties.
3 I worked on the Mariner and Surveyor space missions on
4 some very small computer systems at jet propulsion labs
09:34:34 5 in southern California.

6 And then as I got -- after I got my MBA
7 degree and started working in the industry, most of
8 my -- the companies I worked for were hardware
9 manufacturers that had a large software content to their
09:34:54 10 products.

11 And I was involved in both specifying
12 hardware characteristics and software characteristics for
13 their products and marketing both the hardware and
14 software.

09:35:05 15 Q. Okay.

16 A. Once I started as a consultant, back in -- I
17 started in 1980, and back then, there were a variety, a
18 greater difference in hardware vendors than there are
19 today, and we had to look at both the hardware offerings
09:35:23 20 and the software offerings. And we looked at a wide
21 variety of different computer platforms from IBM to
22 Digital Equipment Company to companies like Compaq and so
23 forth.

24 I also got heavily involved in the hardware
09:35:40 25 and various equipment involved in computer networking. I

1 had clients with very large local area networks which are
2 in a single building, and wide area networks that could
3 be distributed among buildings or over -- or nationwide.
4 And so I got involved in the hardware and equipment
09:35:59 5 aspects of networking.

6 Does -- as a consultant, also, these days,
7 the hardware that most software runs on is pretty
8 generic, but I get involved in making sure that my
9 clients have the appropriate power of the hardware that
09:36:22 10 they're using to support the software applications
11 they're trying to use.

12 Q. All right. Very good. The jury has heard
13 testimony about something called "hardware sizing."

14 Just without going into great detail, do
09:36:34 15 you have experience in working with clients and
16 consulting with clients with respect to hardware sizing
17 in the ERP space?

18 A. Yes. And that's what I was just referring to at
19 the end was making sure they got the right amount of
09:36:47 20 processing power, networking power to support the
21 applications.

22 Q. All right. Great. Let's talk about some of your
23 specific opinions and conclusions in this case.

24 You mentioned your experience with
09:36:59 25 marketing of computer software and computer hardware.

1 A. Yes.

2 Q. There's been some testimony in this case with
3 respect to how Business One was both marketed through
4 literature and how Business One was distributed.

09:37:12 5 I'd like to focus right now on the second
6 part, how Business One was distributed.

7 Did you come to some understanding of how
8 Business One, the product itself, was distributed by SAP?

9 A. Yes, I did.

09:37:24 10 Q. And can you explain what you understand?

11 A. Yes.

12 SAP made the decision to distribute
13 Business One through independent companies. Because SAP
14 markets software to -- from very small companies to very
09:37:44 15 large companies, they have to concentrate, or the
16 pressure on them is to support the largest company so in
17 order to be able to support the smaller and mid size
18 companies, the ones that would be using the Business One
19 product for the most part, they market it through local
09:38:07 20 distributors that remarket their software to the
21 companies and then are there for the customers to develop
22 add-ons potentially and to support them locally and for
23 whom their customers would be their primary customers.

24 Q. Okay.

09:38:27 25 A. Rather than --

1 Q. Now, based on your experience in consulting with
2 other clients and even reviewing Business One on behalf
3 of clients in the past, can you tell the jury, is the
4 model through which SAP distributed Business One through
09:38:42 5 independent resellers, is that a model that's -- that you
6 find typically within the industry?

7 A. Yes. We find it from the small part of the market
8 on up to the large part of the market.

9 Generally, the independent companies that
09:38:57 10 are marketed through are called partners or business
11 partners, something like that, and that's common
12 throughout the ERP market space.

13 Q. Give the jury a sense, in your experience, are
14 there other companies that the jury might be aware of
09:39:11 15 that sell ERP software and distribute it through a
16 channel or, as you say, so-called business partners like
17 SAP does with Business One?

18 A. The biggest competitor would be Oracle.

19 MR. LAMBERT: Objection.

09:39:26 20 THE COURT: Overruled.

21 A. Microsoft does the same thing. And then there are
22 some companies that are industry-specialized. Some of
23 them market direct and some of them use business
24 partners.

09:39:42 25 Q. Okay.

1 Now, in the engagements that you've had as
2 a consultant for clients with respect to looking at
3 business software like Business One, do you have -- have
4 you had occasion to actually interact with distributors
09:39:56 5 or resellers or, as you call them, business partners?

6 A. Yes.

7 Q. Distributing software?

8 A. Yes.

9 Q. Okay.

09:40:01 10 A. In dozens of cases.

11 Q. And can you explain to the jury what, based on your
12 experience, is the role of a distributor of a vendor's
13 software product?

14 A. The role is --

09:40:17 15 MR. LAMBERT: Objection.

16 THE COURT: Overruled.

17 A. The role is to find the customers, to qualify the
18 customers to make sure that they're selling the product
19 to the customers where the product can actually perform,
09:40:39 20 and to implement the product.

21 When I say sell, I actually mean products
22 get licensed. You don't actually sell software. You
23 license it.

24 Then to implement the products and support
09:40:49 25 it at the customer after it's implemented.

1 Q. Now, when you had occasion to consider Business One
2 on behalf of clients that you consulted with, in those
3 experiences, were you dealing directly with SAP or were
4 you dealing with a reseller or a distributor of SAP
09:41:07 5 Business One?

6 A. We were talking to a local representative, a local
7 reseller. I think it was regional. They may have had
8 three or four offices in different cities, one of which
9 was Phoenix where my client was.

09:41:21 10 Q. Okay.

11 And based on that particular experience and
12 other experiences that you've had consulting with
13 clients, what is your understanding of the relationship
14 between the reseller on the one hand and SAP on the
09:41:33 15 other?

16 A. The reseller generally has some sort of a
17 partnership arrangement -- could be formal, could be
18 informal -- with the developer or licensor of the
19 software where they have agreed what services they'll
09:41:49 20 provide and how they'll be remunerated or paid for the
21 services of selling the support and so forth.

22 Q. Okay. In this particular case, have you had
23 occasion to consider the nature of the relationship
24 between SAP on the one hand and LSi, for instance, on the
09:42:07 25 other hand?

1 A. Well, yes. And I guess first, it was a company
2 called IBIS which became -- which was acquired by LSi,
3 and so there was a relationship there. IBIS, I believe,
4 did not have any sort of formal relationship with SAP,
09:42:30 5 and LSi did have a relationship, a partner relationship.

6 Q. Okay. And based on your experience dealing with
7 Business One for other clients and with other software
8 products, do you have an understanding in the industry of
9 what is generally meant by the use of the term "Business
09:42:50 10 partner"?

11 Is this -- is this a legal term, or is this
12 a term of art within the industry that has a different
13 connotation?

14 MR. LAMBERT: Objection, Your Honor.

09:42:58 15 THE COURT: Overruled.

16 A. It -- it's a term that's used, actually not only in
17 the computer industry, in other industries as well, but
18 in the computer industry, it's generally a company that
19 does selling and has an agreement with a developer to
09:43:17 20 sell their products or a company that does servicing has
21 the agreement to service the products, or what have you.

22 It varies from -- and companies like SAP
23 very often have different kinds of partners. They have
24 application partners that offer complementary software.
09:43:37 25 They have resellers. They have service companies, and so

1 forth.

2 Q. Okay. Let's switch topics a little bit.

3 There's been a lot of talk in this case
4 about the word "Users" and the word "Employees" as it
09:43:49 5 relates to ERP software.

6 Do you have experience with respect to how
7 those terms are used within the ERP industry?

8 A. Yes.

9 Q. Okay. And is that experience taken from your role
09:44:04 10 in marketing various software products over the years?

11 A. Yes.

12 Q. Okay. Describe for us what experience specifically
13 you've had over the years with regard to marketing ERP
14 software and how those terms, what those terms mean in
09:44:18 15 the industry?

16 A. Well, the term "Employees" is more or less
17 self-explanatory. There's no difference there between
18 what anyone would consider an employee in the computer
19 industry or in the context of a customer of a computer
09:44:36 20 company and any other context for the term employee.

21 The term "User" refers to the number of
22 people who are employees or sometimes contractors that
23 actually have hands-on use of the software, have a
24 terminal or a computer system in front of them and are
09:44:57 25 actually interacting with the software.

1 Q. Now, with respect to ERP software, and I'm sure
2 it's different from customer-to-customer, but based on
3 your experience, can you approximate how many employees
4 within a company would typically be a user of the
09:45:19 5 company's ERP software?

6 MR. LAMBERT: Objection.

7 THE COURT: Overruled.

8 A. It varies from industry-to-industry, but in
9 distribution, typically it would be 60, 70%. You know,
09:45:35 10 maybe a little less; maybe a little more.

11 It certainly -- I haven't seen in the
12 distribution environment, and as I say, that's the one
13 where I'm most familiar, situations where all of the
14 employees are users.

09:45:47 15 Q. Okay. Now, you understand Hodell is a distributor,
16 it's in the distribution industry?

17 A. Yes.

18 Q. Okay.

19 A. Yeah.

09:45:57 20 Q. Did you come to some understanding as to the number
21 of users versus employees that Hodell historically had on
22 its ERP systems?

23 A. I believe there was some testimony, either
24 deposition or trial testimony, there was something like
09:46:17 25 60 or 70% of their employees were in -- were expected to

1 be users, hands-on users of the system.

2 Q. Okay. And does that range kind of comport with
3 what you would generally expect to see with a
4 distribution company?

09:46:33 5 A. Yes.

6 Q. Okay. Now, there's been talk about the term
7 "Concurrent users."

8 Can you explain what that means?

9 A. Yes. Concurrent users are users that are using the
09:46:44 10 system all at the same time.

11 Typically, for instance, you might have
12 someone in the warehouse that occasionally has to look
13 something up, but most of what they do is, when shipments
14 come in, they accept shipments. When they put the stock
09:46:58 15 on the shelves, when they get pick lists, they would grab
16 the products and stage them for sending to the companies.
17 They take inventory. They do a lot of things that take
18 them away from the computer.

19 And on the other hand, accounting people,
09:47:16 20 for instance, might be using the computer all the time or
21 almost all the time they're at work. So it, you know, it
22 would vary.

23 But the concurrent users, at any given
24 time, it's the percentage of the users that are actually
09:47:31 25 hands on with the system interacting with it.

1 Another group that might not use it very
2 often might be salespeople. Every now and again, they
3 have to look up something on the computer, but most of
4 the time they're out selling.

09:47:44 5 Q. Now, let's talk a little bit about -- let's dig a
6 little deeper on the terms "Users" and "Employees."

7 Have you personally had occasion with
8 respect to marketing campaigns of defining software or
9 targets for software in terms of the number of employees
09:48:00 10 that a company has?

11 A. I don't remember specific campaigns, but that would
12 be a typical thing that I would have done was at a high
13 level, the level that would be aimed at making sure that
14 the marketing approach was targeted to the highest level
09:48:25 15 decision makers, company owners, general managers of
16 operations and so forth. We would talk about employees
17 so they could get an idea of what size company that the
18 product was aimed at and wouldn't get down to the
19 granular, very often the granular idea of how many
09:48:47 20 concurrent users, users or concurrent users there are.

21 Q. Now, you understand that ultimately -- let me ask
22 you a different question.

23 How ultimately is business software like
24 Business One actually acquired by a customer like Hodell?

09:49:02 25 What happens?

1 MR. LAMBERT: Objection.

2 THE COURT: Overruled.

3 A. Software like Business One, as I say, the
4 developers don't sell the software because if they -- if
09:49:13 5 you sell someone software, they can resell it, and the
6 developers keep the rights to the software themselves, so
7 what they do is they license their customers to use the
8 software.

9 And so either the software developer or its
09:49:29 10 business partner goes in and sells a license to the
11 software -- to the company that's going to use it. Is
12 that what --

13 Q. Yeah, that's where I'm going.

14 And in the context of licensing the
09:49:43 15 software, how is the software licensed? Is it licensed
16 just a blanket license to the company, they can
17 use -- they can have as many people use it as they want,
18 or is it done specifically by particular numbers of
19 people who will actually be permitted to use the
09:49:59 20 software?

21 Help us to understand that.

22 A. Back in the early eighties when I started this,
23 very often it was unlimited users because the
24 functionality of the ERP software wasn't as broad as it
09:50:09 25 is today.

1 But certainly by the -- by the 1990s and
2 the 2000s, typically the software is licensed based on a
3 user count, and sometimes it's a concurrent user count
4 and sometimes it's a named user count.

09:50:27 5 Q. And do you have an understanding in this particular
6 situation of how SAP in particular licensed Business One
7 to a company like Hodell?

8 Was it by concurrent user count, by named
9 user count or --

09:50:43 10 A. It was --

11 MR. LAMBERT: Objection.

12 THE COURT: Overruled.

13 A. It was by the named user count, it was the number
14 of users in total that would be using the software; not
09:50:52 15 the concurrent users.

16 Q. And just so we understand, does the named user
17 designation simply mean that each person who is going to
18 actually use the software, has to have a license of their
19 own?

09:51:05 20 A. Well, very often it's not assigned to individual
21 users, but the company takes a count of -- because
22 potentially every single-user could theoretically be on
23 the system at once concurrently, so it's a total number
24 of people that have terminals or PCs that interact with
09:51:29 25 the software that could use it.

1 Q. So help us understand.

2 If software like Business One is licensed
3 by the particular number of users that a company has, why
4 in your experience would we see software vendors like SAP
09:51:46 5 in marketing literature discussing their target in terms
6 of the number of employees?

7 A. It's sort of a qualification thing so that
8 the -- so as, as I say, the highest level decision makers
9 can immediately relate the size of their company in terms
09:52:08 10 of number of employees to the target market for the
11 software.

12 Q. Okay. And is ERP software like Business One, is it
13 a one-size-fits-all product or is there more that needs
14 to be investigated to determine whether the product is
09:52:25 15 correct for any particular customer?

16 A. Business One is what I would refer to as a
17 cross-industry product or broad product that could work
18 in a wide variety of different types of companies.

19 It might work, depending on the needs of
09:52:46 20 the companies, how it works is different, so the reseller
21 has to look very carefully at the intended function that
22 the company needs, and how the software fits for that
23 particular application.

24 Q. Okay. Let's take a look at some of the marketing
09:53:06 25 literature that we've seen and the jury has taken a look

1 at in this case.

2 Bob, will you pull up Exhibit 314, please?

3 Sir, there's been testimony about this
4 document. Is this one that you have seen previously in
09:53:18 5 preparing your report, for example?

6 A. Yes.

7 Q. All right.

8 And, Bob, if you can go to the second page,
9 please, there's some circled text. Everybody
09:53:29 10 has -- everybody in this room has seen this a lot.

11 We'll move pretty quickly, but if you can
12 just blow it up, there's one of the things that has been
13 focused on is the second sentence that says: "The
14 solution helps emerging businesses, from those with 10 to
09:53:46 15 several hundred employees, to streamline their
16 operational and managerial processes."

17 Do you see that?

18 A. Yes, I do.

19 Q. All right. Let me just step back.

09:53:54 20 In your experience, not this case in
21 particular, but your experience in the computer and
22 software industries, is this the kind of generic
23 marketing statement that you often see from software
24 vendors?

09:54:06 25 A. Yes.

1 Q. Is it unusual in your view to see a software vendor
2 define or describe potential customers by terms of -- in
3 terms of employees?

4 A. It's very common.

09:54:19 5 Q. Okay. Have you also seen companies define their
6 target in terms of user count?

7 A. Yes.

8 Q. Okay.

9 A. And sometimes they include both, sometimes just
09:54:31 10 one, and sometimes just the other.

11 Q. Okay. In your experience, what, when you read a
12 statement like this, what do you understand this to be
13 suggesting?

14 A. When I read a statement like this for a product,
09:54:47 15 that's a cross-industry product as I've described, I'm
16 looking at it and saying, okay, this is a product not for
17 Fortune 500 companies, not for big multi-nationals, but
18 for smaller and mid-sized companies. And since it
19 doesn't say anything about specific industries, you know,
09:55:08 20 for some of those companies maybe the, you know, best
21 usage would be for pretty small configurations, for
22 others, it might be quite large.

23 But this doesn't -- this doesn't limit in
24 any way, other than it's telling me this is not for big
09:55:26 25 multi-nationals.

1 Q. Okay. And when you read something like this, in
2 your -- in your professional experience, is this telling
3 you or a potential customer anything or promising
4 anything about a specific number of users that any client
09:55:41 5 could have?

6 MR. LAMBERT: Objection.

7 THE COURT: Overruled.

8 A. No. Software isn't sized like -- like shoes. You
9 don't -- you don't buy a size 10 or a size 11E or
09:55:52 10 something. This is basically just a broad marketing
11 description.

12 Q. Is there more that needs to go into investigating
13 the particular software application and its usability for
14 a particular customer than simply a marketing document
09:56:09 15 like this?

16 A. I'm sorry, could you --

17 Q. Sure. You've testified that over the years, you've
18 consulted with 200-plus companies like Hodell that are
19 interested in purchasing software.

09:56:20 20 Based on your experience, is there more to
21 be done in the process of selecting software than just
22 looking at marketing documents like this?

23 A. Much more. That's -- you know, I described the
24 five-step process that I go through, and it's fairly
09:56:36 25 formalized when I do that with a company, but even if

1 they don't use a consultant, they have to go through
2 those same steps. And there's a lot more to determining
3 whether the software is a fit than just looking at some
4 broad statement like this.

09:56:49 5 Q. Okay. Great. And that would be the five steps
6 that you went through earlier?

7 A. That's correct.

8 Q. Bob, let's go to Exhibit 618 --

9 A. The first three of the five.

09:56:57 10 Q. The first three of the five?

11 A. Yeah.

12 Q. Very good. I'll move quickly through this. The
13 jury has seen this one a lot.

14 This is a document that's called an SAP
09:57:09 15 Business One Whitepaper. Bob, go to 618. It's 618.18.

16 And if you can blow up that top part.

17 Mr. Hilliard, there's been quite a lot of
18 testimony in this case about this particular document and
19 this section of the document.

09:57:30 20 Given your background in marketing software
21 and your experience with hardware, I'd like to find out
22 from you your understanding of what's being described
23 here.

24 Again, this is from a document called the
09:57:45 25 SAP Business One Whitepaper. And it says here under the

1 heading, "Technology," "Business One is a Windows-based
2 client/server application."

3 What do you understand that to mean?

4 A. Well, basically as you noted, this is about the
09:58:01 5 technology, and this is describing how Business One is
6 built or architected. And what it says is that it's
7 architected such that there's a server, and the
8 server --

9 MR. LAMBERT: Objection as being outside
09:58:17 10 the scope of his expertise.

11 THE COURT: Overruled.

12 A. The server is where the applications run and so
13 forth, and there are clients, and those are the stations,
14 PCs, that the actual users use.

09:58:28 15 Q. Okay.

16 Mr. Guembel, when he testified -- by the
17 way, have you had a chance to review all of Mr. Guembel's
18 testimony, both at his deposition and during trial?

19 A. Yes, I also read his report.

09:58:40 20 Q. You read his report. And just so the jury
21 understands, to review -- you weren't here for
22 Mr. Guembel's testimony, you weren't live in the
23 courtroom for that, correct?

24 A. I was not.

09:58:48 25 Q. You had an opportunity to read the written

1 transcript from his testimony here in court, though,
2 correct?

3 A. Yes, I've done that.

09:58:58

4 Q. Okay. He described for the jury that Business One
5 is what's called a two-tiered architecture.

6 Is that what this first sentence is
7 referring to when it says it's a Windows-based
8 client/server application?

9 A. Yes.

09:59:10

10 Q. Okay. We'll come back to that a little bit more.

11 It goes on to say, "It's designed as a
12 fat-client application where the business logic runs on
13 the end user's PC."

14 What does that mean, sir?

09:59:24

15 A. It means that a lot of the programs that control
16 what the user's interacting with are executing on the PC.
17 Generally a lot of them are also executing on the server
18 as well. But it's saying that in this case, it's a fat
19 client, meaning the PC does a lot of the processing as
20 well as the server.

09:59:47

21 Q. Okay.

22 And we'll come back to the hardware
23 configurations and talk about what Mr. Guembel had to say
24 about the various hardware pieces of this.

09:59:58

25 I'm interested in the next paragraph. It

1 goes on, "To secure critical business and system
2 processes, a robust MS-SQL database is used."

3 Sir, do you have an understanding of what
4 the MS-SQL 2000 database is?

10:00:15 5 A. Yes. It's a general purpose database software
6 product that maintains data. It's used in a -- as the
7 basis for a wide variety of software, particularly ERP
8 software, but others as well.

9 Q. And MS-SQL, who puts out that product, if you know?

10:00:33 10 A. The MS stands for Microsoft and SQL means
11 structured query language. People often abbreviate that
12 by saying SQL and refer to this as the SQL server.

13 Q. Okay. The jury has heard a lot about this.

14 Can you break down very quickly, just to
10:00:52 15 step back. We know Business One is a two-tiered
16 architecture with the client which is the PC, right, that
17 the end user runs?

18 A. Yes.

19 Q. And then there's a server?

10:00:59 20 A. Yes.

21 Q. And that server, is that a piece of hardware?

22 A. Yes.

23 Q. And the MS-SQL 2000 database, is that a piece of
24 hardware or is that software?

10:01:08 25 A. That's software that runs on the server.

1 Q. Software that runs on the server, okay.

2 And is that software, I think you mentioned
3 that software is used by various ERP platforms.

4 To your understanding, are there other ERP
10:01:22 5 software products besides Business One that use the
6 MS-SQL database?

7 A. Oh, a wide variety of them. Microsoft has its own
8 application software, and there are a wide variety of
9 other application ERP products that use MS-SQL. Some can
10:01:39 10 use -- choose between various databases and have
11 interfaces to more than one database.

12 Q. All right. Very good.

13 So this first sentence describes the robust
14 MS-SQL 2000 database and it goes on in the next sentence
10:01:55 15 to say, "It supports an unlimited number of simultaneous
16 user transactions."

17 Do you see that?

18 A. Yes.

19 Q. What do you understand that sentence to refer to
10:02:02 20 and to mean, sir?

21 A. I understand that, I think pretty clearly, that at
22 least in the way I read that and the way I think most
23 people would read that, that refers to the SQL 2000, SQL
24 server 2000 database in the preceding sentence and it's
10:02:21 25 saying that this is a powerful database that has the

1 capability of supporting up to a huge number of users.

2 Q. And is that database separate from Business One as
3 a core product?

4 Do you understand that question?

10:02:39 5 A. It's a separate product. Business One is an SAP
6 product developed by SAP, licensed by SAP. MS-SQL 2000
7 is a Microsoft product. Two different products developed
8 by two different companies. One is basically the
9 platform on which the other one is supported by.

10:02:58 10 Q. Very good. Let me cover one other topic with
11 respect to marketing that the jury's heard about, and
12 then I want to get into addressing some of the things
13 that Mr. Guembel talked about with the jury.

14 There's been a lot of talk in this case
10:03:14 15 about a so-called Sweet Spot.

16 Are you, in your experience in the computer
17 industry, familiar with that term as it applies to ERP
18 software?

19 A. Yeah. Well, it's a marketing term. It's often
10:03:28 20 used in the software industry, but it's used in a lot of
21 industries to indicate basically the market that the
22 product marketers or the developing company intends to be
23 the primary target that they want their salespeople to
24 sell the product to.

10:03:48 25 Q. All right. Let's step back a little bit. Let's

1 make sure the jury understands what basis you have to say
2 the things that you just said.

3 What experience have you had over the years
4 with respect to either using the term "Sweet Spot"
10:04:03 5 yourself, or seeing that term used by ERP providers?

6 A. Well, as a product marketing manager myself, I
7 would have used that term in -- when working with my
8 company's salespeople to indicate where they ought to be
9 focusing their sales efforts. Not necessarily
10:04:33 10 restricting them, because very often the product would be
11 usable in other -- in other areas or beyond what the
12 Sweet Spot is, but where I felt was the best -- the best
13 use of their time to try and market the product.

14 Q. Okay. So you yourself have had personal experience
10:04:52 15 with establishing so-called Sweet Spots for different
16 products in this field?

17 A. Yes.

18 Q. Okay. And help the jury to understand, in your
19 experience with establishing so-called Sweet Spots, is
10:05:06 20 that done as a, for lack of a better phrase, as a
21 marketing tool, or does this have a connotation of
22 specific technical limitations with respect to the
23 product that's being defined?

24 A. The former. It's a -- it's a direction or a target
10:05:24 25 that the salespeople -- that the marketers think the

1 salespeople will find most productive, but it doesn't
2 necessarily limit them, and very often in my experience
3 as a consultant, I would look at solutions for clients
4 that might be outside those solutions' Sweet Spots but
10:05:46 5 where the software would work for them even though it
6 wasn't their primary focus.

7 Q. Okay. Do you have an understanding of what Sweet
8 Spot definitions SAP used over the years with regard to
9 Business One?

10:06:01 10 A. What Sweet Spots Business One was targeted at?

11 Q. Yes, sir.

12 A. Yeah. And it varied from time to time as SAP
13 changed how they wanted to market Business One in
14 relation to their other product lines.

10:06:16 15 Q. Okay. Well, let's talk about the other product
16 lines.

17 The testimony has been, of course, that SAP
18 has multiple products, including products that serve the
19 biggest organizations in the world.

10:06:25 20 You're familiar with that, right?

21 A. That's correct.

22 Q. Okay. In the setting of a company like SAP where
23 it has multiple product lines, can you help the jury to
24 understand why a company like SAP would want to establish
10:06:37 25 something called a Sweet Spot with respect to its various

1 products?

2 A. Well, sure. In particular, the large SAP products
3 provide similar functionality but can command a much
4 higher price in a marketplace because say at Ford or
10:07:05 5 General Motors or someone might be willing to spend a lot
6 more than a local hardware distributor or fastener
7 distributor so they would design the product so that one
8 product might be implementable by, you know, companies
9 like IBIS/LSi and be able to be implemented at a price
10:07:30 10 point that the companies in that size range can afford,
11 and a different product -- although it would still work
12 in that space like the ECC product or the mySAP product,
13 while it would still work for a company, a smaller
14 company, is much more expensive to implement and so they
10:07:56 15 set up the target so that the particular sales
16 organization that's going to be selling the product and
17 supporting it can focus on where they can provide a
18 useful value relationship to their customers.

19 Q. Okay. Have you had occasion to consider, based on
10:08:17 20 the evidence of this case, whether SAP's
21 marketed -- pardon me -- SAP's Sweet Spot definition for
22 Business One was a marketing definition on the one hand
23 or whether it actually was a technical limitation or
24 technical definition on the other?

10:08:32 25 A. The documentation I've seen and the testimony I've

1 seen indicates that it was a marketing designation.

2 Q. Okay. Help us understand why you say that. What
3 have you reviewed and what forms the basis for that
4 conclusion?

10:08:47 5 A. Well, I've seen a good deal of information
6 indicating that although the Sweet Spot, so-called, for
7 the product was smaller companies, that the product was
8 actually installed and operational and successful in much
9 larger companies. It was tested in much larger
10:09:08 10 configurations outside the designated Sweet Spot by SAP.

11 I've seen documents and I believe there's
12 been testimony here that I -- in this room that I've seen
13 that indicated that it would -- was installed and running
14 in hundreds of companies much larger than the so-called
10:09:30 15 Sweet Spot. And of course, it was installed at
16 Hodell-Natco, and there is some -- which in some ways was
17 outside the Sweet Spot, but there were actual
18 measurements to show that the way it was running was well
19 within industry norms for the way software ought to run.

10:09:52 20 Q. All right. And we're going to break some of those
21 things down.

22 Let me just stay at a higher level, because
23 with respect to the Sweet Spot, the jury has seen
24 multiple e-mails. For instance, an e-mail from Mr. Ziv
10:10:05 25 in April of 2007 after Hodell went live.

1 Are you familiar with Mr. Ziv's e-mails?

2 A. I am.

3 Q. And e-mails where Mr. Ziv said things like, "This
4 is outside of the sane Sweet Spot"?

10:10:18 5 A. Yes.

6 Q. Okay. In forming your opinions, did you consider
7 those e-mails from Mr. Ziv and Mr. Ziv's testimony about
8 his own e-mails?

9 A. Yes, I did.

10:10:28 10 Q. Okay. And when you formed your opinion as to
11 whether the Sweet Spot was a -- strike that.

12 When you formed your opinion that the Sweet
13 Spot was a marketing definition and not a technical
14 definition, did Mr. Ziv's e-mails and comments in his
10:10:45 15 e-mails have any impact on your analysis?

16 A. Well, it was one thing that I considered, but I
17 considered a lot of other things as well.

18 He was a developer primarily. He wasn't a
19 tester or an implementer. And so he knows what he
10:11:01 20 developed it for, but -- and I think even when he was
21 asked in his deposition testimony, which I believe has
22 been played here in or provided here in court, he
23 explained that that was sort of an initial reaction and
24 that the types of things that the actual specifications
10:11:28 25 for Hodell-Natco were not things that would, when he

1 actually got down to specific cases and knew the details,
2 that would disqualify the Business One product from being
3 useful for Hodel-Natco, that you'd have to look much,
4 much deeper into the details and the required
10:11:54 5 functionality and the way that it was operating.

6 Q. Very good.

7 A. Intended to operate.

8 MR. STAR: Your Honor, I wasn't sure when
9 you were looking for a break.

10:12:00 10 THE COURT: Is this a good time?

11 MR. STAR: This would be a good time.

12 THE COURT: Okay, folks, we'll take our
13 morning recess.

14 I have two things to attend to during our
10:12:08 15 break and of course Shirle and Sue get a break so it will
16 be a little longer than the 15 minutes.

17 THE CLERK: All rise for the jury.

18 (Jury out).

19 (Recess taken)

10:58:08 20 (Proceedings resumed in presence of the
21 jury as follows:)

22 THE COURT: Be seated, folks.

23 Sorry for the delay.

24 (Discussion had off the record)

11:00:48 25 MR. STAR: Thank you, Your Honor.

1 BY MR. STAR:

2 Q. Mr. Hilliard, let's get back into it.

3 Before I do, I forgot to ask you when we
4 were going through your background and your engagement in
5 this case, tell the jury, what is your rate that you
6 charge for the work that you're doing in this case, sir.

7 A. \$475 an hour.

8 Q. Okay. Let's go back to -- the microphone keeps
9 moving. I'm sorry.

10 Let's go back to Exhibit 618, and I want to
11 focus in on the diagram that's on that page, but before I
12 do it, it's 618.18, Bob.

13 Let's just go back to the language at the
14 top. That phrase there that we went over referring to
15 the Microsoft database, "It supports an unlimited number
16 of simultaneous user transactions," in your experience in
17 working with clients, have you had occasion to work with
18 the Microsoft SQL 2000 database, sir?

19 A. I've had occasion to analyze applications for it,
20 yes.

21 Q. Okay. And do you have any understanding of whether
22 that statement there that the Microsoft SQL 2000 database
23 supports an unlimited number of simultaneous user
24 transactions, whether that statement is accurate?

25 MR. LAMBERT: Objection.

1 THE COURT: Overruled.

2 A. It can support a huge number.

3 Unlimited might be a little hyperbole, but
4 it can support a huge number, well more than a
5 distribution company of the scope and size of Hodell
6 could ever conceive of needing.

7 Q. Okay. And you've talked a little bit when we went
8 through this language before that there are other ERP
9 products besides Business One that utilize the MS-SQL
10 database.

11 Is that where you get your experience to be
12 able to offer the testimony that you just offered?

13 A. Yes.

14 Q. Okay. Let's go into the specific things that
15 Mr. Guembel testified.

16 Bob, if you can take that down and if you
17 don't mind blowing up the picture that's just below it on
18 618.18, same page.

19 Okay. I'm just going to leave this
20 rudimentary looking diagram up here. Mr. Guembel, when
21 he testified, had a large demonstrative which depicted a
22 two-tiered system, but as you said earlier, this is a
23 fair depiction of that same kind of system, correct?

24 A. Yes.

25 Q. And the client is the actual end user's PC, the

1 machine, the personal computer, right?

2 A. Yes.

3 Q. And that's a piece of hardware, of course?

4 A. It is.

11:03:35 5 Q. And, of course, at the bottom we see that there's a
6 server.

7 That's also a piece of hardware, correct?

8 A. That's correct.

9 Q. So this is a fair enough description or depiction
11:03:47 10 of two-tiered system, is that right?

11 A. There would be multiple clients, but yes.

12 Q. Multiple clients, and multiple clients would
13 represent multiple different personal computers and
14 people using those computers, correct?

11:04:00 15 A. Yes.

16 Q. And they would all just connect to the server
17 itself?

18 A. Through a network, that's correct.

19 Q. Okay. Very good. Let's go through some of the
11:04:08 20 opinions and the testimony that Mr. Guembel offered.

21 You're familiar with his testimony, we went
22 through that before.

23 One of the things he told this jury was
24 that Business One, because it's based on a two-tiered
11:04:21 25 architecture, has inherent limitations and trouble with

1 scaling to larger user counts.

2 Have you had a chance to consider

3 Mr. Guembel's opinion to that effect?

4 A. Yes, I have.

11:04:34 5 Q. Have you reached, with a reasonable degree of
6 professional certainty, your own opinion with respect to
7 what he's discussed?

8 A. Well, there may be some limits, but they're nowhere
9 near what he said.

11:04:48 10 Two-tiered architecture systems
11 historically have supported thousands of users.

12 Q. Let's go back through it and talk about the history
13 of two-tiered architecture.

14 When did you first become familiar with
11:05:02 15 that type of architecture in an ERP system?

16 A. It became popular in the early nineties, to
17 my -- to my recollection when you actually had a client
18 that had some of the logic on the client as opposed to
19 everything being in the central computer, what we now
11:05:20 20 called server.

21 Q. So we've heard that term logic before. As
22 noncomputer people, can you explain what exactly you
23 mean?

24 A. The logic is where the processing occurs, where the
11:05:29 25 actual programs run.

1 Q. And are you saying that in a two-tiered system, the
2 actual programs are running on the server?

3 A. In a two-tiered system, you have some programs
4 running on the client and some programs running on the
5 server.

6 Q. And the client is the PC?

7 A. That's correct.

8 Q. Okay. Now, there are other kinds of architectures
9 for ERP systems, is that fair?

10 A. Yes.

11 Q. And what other kinds exist out there?

12 A. Well, there are what you would -- might call
13 one-tiered systems where you have a central computer and
14 all the users are interacting with what we call dumb
15 terminals, not PCs, but actual just terminals that have
16 no processing power, no logic in the terminal themselves.

17 Q. Can you give us an example of a system that is a
18 one-tier system?

19 A. Well, the old FACTS system from the -- from the
20 eighties or the old Profit 21 system, for instance, from
21 the eighties were one-tiered systems.

22 Q. Okay. So in those situations, you'd have a server
23 and then just a terminal that doesn't do any processing
24 on the end user's part, right?

25 A. And back then instead of calling it a server, we

1 generally called it a central computer but, yes, it's the
2 same, same machine.

3 Q. Of course, there's a two-tiered. Is there anything
4 else?

11:06:49 5 A. Yes, there are three-tiered and multi-tiered
6 systems where the client does essentially the same kinds
7 of things as in a two-tiered system, but the functions
8 that are depicted for the server might be split among
9 different special purpose servers.

11:07:05 10 Q. Okay. So is it fair to say that when you move to a
11 three tiered or even a multi-tiered system, for a
12 customer to have to purchase and install and continue to
13 maintain different layers of hardware?

14 A. I'm not sure what you're asking.

11:07:21 15 Q. Sure. You described that when you go from a
16 two-tiered system to something like a three-tiered or a
17 multi-tiered system, I think what you said was there's an
18 additional layer of hardware in there, is that correct?

19 A. That's correct.

11:07:33 20 Q. Okay.

21 Is it fair then to say that in those
22 systems, the customers, companies like Hodell if it
23 wanted to use a three-tiered or multi-tiered system,
24 would have to have additional hardware to purchase and
11:07:45 25 maintain?

1 A. Yes, indeed, and there's additional costs
2 associated with that, because additional -- it's an
3 increasingly complex system.

11:07:57

4 Q. Okay. Now, Mr. Guembel suggests that there were
5 limitations just on the two-tiered system.

6 Is it your view that there are
7 limitations -- strike that.

11:08:13

8 Are there limitations on any kind of
9 software architecture? You've described the one-tiered,
10 two-tiered, three-tiered, multi-tiered. Are these
11 things -- do these things just inherently have some
12 limits just by their own nature?

11:08:32

13 A. In any -- for any given application with any given
14 set of functions that need to be performed and any given
15 set of hardware that it's running on at the server and at
16 the client or servers, if it's a multi-tiered system,
17 there would -- there would be limitations for that
18 particular configuration, yes.

11:08:48

19 Q. Okay. Now, other than Business One, what products
20 are you familiar with, if any, that actually run on a
21 two-tiered architecture basis?

11:09:09

22 A. Well, SAP's older product R/2 is a two-tiered
23 system. The older People Soft system, which is a
24 competitor to R/2 now owned by Oracle, was a two-tiered
25 system. And as I say, the older FACTS and Profit 21

1 systems, I had clients using both of those.

2 Q. Okay.

3 A. Were two-tiered systems.

11:09:22

4 Q. In your experience with these various products over
5 the years, did you ever find or reach a conclusion that a
6 two-tiered system on its own had inherent limitations for
7 the number of users that could be run on that system?

11:09:47

8 A. No. Generally, you could -- you could scale up the
9 support by adding more hardware power in the server
10 and/or the client machines, up to the limits that
11 those -- that equipment could support.

11:10:11

12 Q. Okay. Now, Mr. Guembel testified to the effect
13 that the addition of newer or updated or more robust
14 hardware on a two-tiered system wouldn't necessarily make
15 a dramatic improvement on the number of users that he
16 believed could be supported by a system like that.

17 Do you have a response to that?

18 A. I think that's flat out wrong.

19 Q. Why?

11:10:24

20 A. Well, just take -- if you tried to run, for
21 instance, today's PC software on the computer you were
22 running back in 1995, it would choke, but it runs fine
23 today.

24 So the same thing applies here.

11:10:37

25 If the client starts to slow down, a bigger

1 client can allow it to process faster, you don't run into
2 the bottleneck as quickly and particularly at the server
3 as you add server power. Even in a two-tier, the more
4 powerful the server is, it works just like the personal
11:10:56 5 computer sitting on your desk, when you start doing more
6 things on it and it starts to slow down, and pretty soon
7 you start to say, boy, maybe I get a more powerful
8 computer, you do. And once you get everything running on
9 it, it runs fine again.

11:11:13 10 Q. And is it your testimony that from a general -- as
11 a general proposition, using newer, more robust hardware
12 will increase performance in a two-tiered ERP system?

13 A. Yes.

14 Q. Okay. Let's look a little bit further at
11:11:27 15 Mr. Guembel's opinions.

16 Did you have a chance to look at the basis
17 for Mr. Guembel's opinions, the things that he relied
18 upon?

19 A. I did.

11:11:36 20 Q. Okay. Bob, would you please go to the Carnegie
21 Mellon article.

22 You're aware that one of the pieces of
23 information that Mr. Guembel relied on was an article
24 from Carnegie Mellon from 1997?

11:11:50 25 You're familiar with that?

1 A. I am.

2 Q. Okay. And you've had a chance to look at that in
3 forming your own opinions?

4 A. Yes.

11:11:56 5 Q. Okay. You're also aware that -- and, Bob, if you
6 go to -- blow up the first page there, please. Sorry,
7 scroll down to the second page. I think the quote we're
8 looking for is there. Okay. Right there.

9 And particularly, you're aware that
11:12:18 10 Mr. Guembel cites to this section of this 1997 article
11 from Carnegie Mellon?

12 A. Yes.

13 Q. Dealing with two-tiered architectures.

14 And you see that in the middle paragraph
11:12:29 15 there, this article says that the, "Two-tier
16 client/server architecture is a good solution for
17 distributed computing when work groups are defined as a
18 dozen to 100 people interacting on an LAN
19 simultaneously."

11:12:44 20 You mentioned LAN earlier, what does that
21 mean?

22 A. A LAN is a local -- it stands for local area
23 network. It's a network with -- generally within a
24 single building, a network where you can actually run
11:12:59 25 hard cables, sometimes through conduits to a second

1 building, but generally within a single, within a single
2 building.

3 Q. Okay.

4 It goes on talking about the two-tiered
11:13:08 5 client/server architecture to say, "It does have a number
6 of limitations. When the number of users exceeds 100,
7 performance begins to deteriorate."

8 In reaching your own conclusions, your
9 opinions that you offered here that you don't believe
11:13:23 10 there are limitations, did you consider this article from
11 Carnegie Mellon?

12 A. Well, I looked at it but it's -- I don't think it's
13 applicable to the Business One situation at Hodell.

14 Q. Explain why.

11:13:37 15 A. Well, it's out-of-date. In fact, I believe these
16 numbers come from a prior article noted at the bottom of
17 the paragraph, Schussel, '96.

18 Q. Okay. Let's take a look at that one. Bob, Can you
19 pull that one up?

11:14:00 20 And is this the Schussel article?

21 A. Yes.

22 Q. And you've had a chance to look at this and review
23 it in forming your opinions?

24 A. I -- I did, yes.

11:14:09 25 Q. Okay. And at the bottom it starts to describe a

1 two-tier architecture. Do you see that?

2 A. Yes, I do.

3 Q. Okay.

4 A. And I've looked at that before.

11:14:18 5 Q. And you've looked at that before. Go to the next
6 page, if you would, Bob.

7 And under the heading down there,

8 "Client/server in large enterprise environments,"

9 Mr. Hilliard, did you review this portion of the Schussel

11:14:35 10 article in reaching your opinions in this case?

11 A. Yes.

12 Q. Okay.

13 The jury's already seen this. So I won't

14 dwell on it too much, but at the very end of the first

11:14:46 15 paragraph, it makes the comment that, "With 50 clients

16 and today's typical PC hardware, this is no problem.

17 When one has 2,000 clients on a single server, however,

18 the resulting performance isn't likely to be

19 satisfactory."

11:15:01 20 And you reviewed that in reaching your
21 opinions?

22 A. I did.

23 Q. Did this have any influence on you? Did you put

24 any weight or credibility in this?

11:15:16 25 A. Well, if you look at it in the context of 1995, it

1 says, "Today's typical PC hardware."

2 Now, the date of this isn't -- I don't
3 think it's specified right in the article, but in the
4 footnotes of the prior article it references it. I
11:15:34 5 believe it says that this is a 1995 article.

6 So with looking at this in the context of
7 1995, and I had clients and I was looking at things like
8 this in 1995, this is not an unreasonable statement to
9 make, although Mr. Schussel does not provide any backup.

11:15:59 10 But, you know, I guess in 1995, I would
11 have been concerned at least about a 2000 user system
12 with the hardware that was available then.

13 Q. You mentioned that Mr. Schussel doesn't provide any
14 backup.

11:16:15 15 What do you mean by that exactly?

16 A. I didn't see any measurements, any tests, any
17 indications of tests he had run or anything of that
18 nature. He may have done it, but I didn't see any
19 indication of that.

11:16:26 20 Q. Okay.

21 As a person with your background, if you
22 were asked to consult for a client and with respect to
23 whether they should implement a two-tiered ERP system,
24 would you be able to reach any conclusion from this
11:16:40 25 article as to whether that system was appropriate or not

1 appropriate?

2 A. You'd have to look at a lot more than this.

3 I mean, certainly if my client needed 3,000
4 users, you have to look at more detail to see whether
11:16:54 5 this was appropriate, but at the bottom end of that
6 range, I wouldn't rely on this, I'd want to rely on
7 something that had actual data supporting it.

8 Q. But -- sorry?

9 A. But I'd look at it.

11:17:11 10 Q. When you say data supporting it, in your experience
11 in the industry, what kind of data, how does that data
12 get generated? What are you typically wanting to look
13 at?

14 A. Someone does stress testing. They do tests where
11:17:24 15 they actually take systems with what they're talking
16 about and they -- there's software that will run
17 simulated usage of the software and they'll test it at
18 different usage levels, and you can get data that way.

19 Q. Okay. Is it fair to say that you've reached the
11:17:45 20 opinion that there are no inherent limitations in a
21 two-tiered system?

22 A. No inherent limitations for a company of this size,
23 complexity and scope of Hodell.

24 Q. Okay.

11:18:01 25 Is it also your opinion that changes to

1 hardware, improvements to hardware, have an impact on the
2 speed and performance of a two-tiered system?

3 A. Absolutely.

4 There were two-tiered systems in 1995 that
11:18:14 5 were supporting far more than 2,000 clients.

6 Q. Give us an example of some of those.

7 A. Well, every SAP customer then was running something
8 called R/2 and those included some of the biggest
9 multi-nationals in the world.

11:18:28 10 Same with Oracle's products.

11 Q. And they were running on two-tiered systems?

12 A. That's all that was around.

13 Q. Okay. And you're familiar with the progression --

14 A. For the most part. For the most part.

11:18:37 15 Q. And you're familiar, given your experience, with
16 the progression and the improvements in computer
17 hardware, correct?

18 A. Yes.

19 Q. All right. I'd like to put up a diagram here and
11:18:47 20 ask you whether this is something that you would
21 generally agree with.

22 If you want, you can grab a little
23 microphone and maybe come over and --

24 A. Yeah, it's hard to read on the screen.

11:19:03 25 Q. You can come over here and maybe walk the jury

1 through this, if you'd like.

2 A. Okay.

3 Q. Sir, what we have here is a document from a company
4 called Intel.

11:19:54 5 Are you familiar with Intel?

6 A. Yes. They're the chip manufacturers that
7 manufacture the basic chips that are in all personal
8 computers, almost all servers. Today they're in both
9 Macintosh computers and PCs.

11:20:17 10 Q. Okay. Very good.

11 Have you had a chance to review the diagram
12 that's up there in front of the jury right now?

13 A. I have.

14 Q. Okay. Can you tell the jury what you see, given
11:20:29 15 this and your experience in the industry, as having been
16 the progression of computer hardware over the years?

17 A. Well, the computer hardware has increased in market
18 penetration and in power from in the eighties and even
19 before, on up to the present.

11:20:50 20 The chips have gone from relatively
21 unsophisticated low-powered chips to much higher-powered
22 chips and so forth.

23 Q. We were just talking --

24 A. The chips are the basic computer engine that runs
11:21:05 25 the software.

1 Q. Okay. Does that relate to the power of the
2 computer?

3 A. Absolutely.

4 Q. Okay. And obviously we were going through the
11:21:10 5 article from Mr. Schussel from 1995.

6 Tell the jury what was the state of
7 computer hardware back in 1995.

8 A. Well, Windows 95 had just come out. The personal
9 computers at that time back in '95 were able to use it,
11:21:29 10 but they were not much more powerful than that.

11 The software that ran on them
12 didn't -- didn't tax them. So these were much less
13 powerful systems that couldn't nearly run the software
14 that we run on them today.

11:21:47 15 Q. And tell the jury how that has changed over the
16 years between 1995 and when Hodell actually started to
17 use Business One in 2007.

18 A. Well, there are -- there are primary parts of a
19 computer system that have major effects on performance,
11:22:08 20 the thing that Hodell was complaining about.

21 One is the processing power of the chips.
22 Another is the networking that connects the two tiers
23 together. And a third would be the speed of the disk
24 drives.

11:22:23 25 Now, from 1995 to the 2005, 2006 time

1 frame, the networking cables that ran the network
2 increased from ten megabytes to a hundred megabytes to a
3 gigabyte, that's a hundred-fold improvement. However,
4 the actual cables that were installed at Hodell were back
5 there from the 1980s. They were even slower than the
6 cables from 1995.

7 The chips increased by a factor of 10 or 20
8 in processing power, from '95 to 2005. In some cases,
9 more than that.

10 And the speed at which data could be looked
11 up and retrieved from a disk drive was cut in half in
12 that time frame.

13 Q. Thank you. And --

14 A. And those things would all affect performance.

15 Q. Okay. That's what I was going to ask.

16 Explain just quickly, if you could, how
17 those things would impact performance of an ERP system
18 like Business One.

19 A. Let's talk about the network cable itself.

20 We talked about the pipe, the pipes or the
21 communications channels between the client and the
22 server. When those get jammed, if you have a wider pipe,
23 i.e. a faster network cable, you can put more data
24 through it in the same amount of time without the data
25 causing a logjam.

1 As I say, we're going from eighties level
2 to 2005, we're talking about a factor of a hundred or
3 more.

4 The chip is how fast the computer actually
11:24:10 5 runs the software, like your word processing software,
6 like your spreadsheets and so forth. The faster the
7 computer runs the software, the more work you can do.

8 If you took, for instance, today's version
9 of Excel and tried to run it on 1995 hardware, well,
11:24:28 10 first of all, the operating system wouldn't support it,
11 but even if it did, it would choke the 1995 hardware. It
12 just couldn't, couldn't run.

13 And the retrieval of data from the hard
14 drive is also important, particularly in business
11:24:42 15 applications, because the hard drive is where all the
16 company's data is stored. It's saved there day after
17 day. It's updated as new orders are taken and as orders
18 are shipped and so forth, and as reports are done and
19 created, all the data is saved on the hard drive.

11:25:04 20 The amount of time it takes to look up that
21 information, retrieve it from the hard drive, affects the
22 performance of the system greatly, and that's doubled.

23 Q. Okay.

24 A. Twice as fast now as it was in the mid
11:25:16 25 nineties -- or twice as fast in the mid 2000 to 2010

1 period than it was in the mid nineties.

2 Q. Very good. We can leave that and have you retake
3 your seat, if you'd like.

4 I'm going to switch to one last topic. You
11:25:30 5 could take that down if you would, Joe. Thank you.

6 Sir, final topic I want to go through with
7 you is whether you had occasion in this case to actually
8 analyze the so-called performance problems Hodell had and
9 determine what, if anything, was causing those problems,
11:25:55 10 and how those problems were resolved, if they were
11 resolved at all.

12 Have you had a chance to look at that?

13 MR. LAMBERT: Your Honor, may I approach on
14 this issue?

11:26:05 15 THE COURT: Sure.

16 (Side-bar conference had off the record).

17 BY MR. STAR:

18 Q. All right. Let me just reset the stage.

19 In this case, obviously Hodell complains
11:27:37 20 that it had so-called performance problems with Business
21 One, In-Flight, and Radio Beacon.

22 You're aware of those complaints?

23 A. Yes.

24 Q. And have you had the chance in the context of this
11:27:48 25 case to actually analyze the actual performance of

1 Business One and to review what, if anything, were the
2 causes of the issues that Hodelle complains about?

3 A. I've seen statistics of measurements that were
4 taken of Business One, and I have had a chance to look at
11:28:06 5 that and analyze, yes.

6 Q. Okay. So let's just step back at a high level.
7 We've talked earlier that you've consulted
8 for over 200 different customers, end users of software
9 for purposes of assisting them with purchasing and
11:28:20 10 implementing their software, right?

11 A. Yes.

12 Q. Okay.
13 In the context of those engagements, have
14 you had the occasion to assist customers who are
11:28:29 15 complaining about performance issues with an ERP system?

16 A. Every implementation has bumps here and there.
17 Some more difficult than others. And certainly I've had
18 clients where there were performance issues that needed
19 to be addressed.

11:28:47 20 Q. All right.

21 In that role working for customers, how, if
22 at all, do you go about investigating the source of a
23 performance problem and coming up with a resolution?

24 A. Well, first, I just look at it, you know, I hear
11:29:05 25 the complaints, I look at it visually. Sometimes it's

1 pretty obvious just from that what's causing it. And
2 then I work with the vendor to try and get that resolved.

3 In other cases, it takes a deeper dive.

4 You have to actually do measurements and look at

11:29:24 5 specifically what the results of those measurements are,
6 sort of function by function, so that you can determine
7 where it is that the issues are that are causing the
8 dissatisfaction.

9 Q. And when you say "Measurements," are you referring

11:29:38 10 to measurements of response times for different functions
11 within the system?

12 A. With performance problems, yes, those are typically
13 the kind of measurements you do.

14 Q. All right. And are you familiar with the manner in
11:29:49 15 which those measurements are taken?

16 How is that done?

17 A. It can be everything from a stop watch, which isn't
18 done that much any more, on up to actually having
19 software that records and saves data on all of the
11:30:09 20 transactions and then records statistically what the
21 performance and response times have been function by
22 function.

23 Q. All right. Very good. And in this particular

24 case, have you had a chance to review any evidence that

11:30:21 25 includes any of these so-called performance measurements,

1 whether through a visual measurement with a stopwatch or
2 through a software tool that's actually measuring
3 performance of the system?

4 A. Yes.

11:30:36 5 Q. Okay. What do you recall reviewing?

6 A. I believe that there were some measurements taken
7 in July of 2007, and there were further measurements, I
8 believe, in October of 2007. Both of those were done
9 with software tools that resided on the server that
11:30:53 10 actually measured response times for various functions
11 within the ERP Business One application.

12 Q. Okay. We're going to take a look at some of that
13 and walk through it in some detail, but before we do it,
14 what I'd like to find out and you can tell the jury, is
11:31:12 15 do you have experience with determining for customers
16 like Hodell what sort of response times are expected or
17 acceptable within industry standards?

18 A. Yes. I know what is the normal response times and
19 what are acceptable and unacceptable response times, and
11:31:34 20 if I have a client and they're complaining about
21 something that's really within the norms of the industry,
22 I tell them, you know, that that's -- it may be a little
23 frustrating for this or that, but that's what you can
24 expect.

11:31:48 25 Q. Okay. Let's take a look at Exhibit 442. I think

1 this is what you were referencing.

2 We'll just go right to the page. This was
3 response times taken back in July of 2007.

4 Have you seen this before?

11:32:00 5 A. I have.

6 Q. All right. Let's walk through it.

7 It says in the upper left-hand corner that
8 this is times measured in seconds, right?

9 A. Yes.

11:32:09 10 Q. And what do you understand this to be recording?

11 A. The response times for -- there's a column right
12 under that that tells what the particular function is,
13 like tabbing out of a line, updating a business partner
14 and so forth, and then for various configurations, it
11:32:27 15 shows what the response time that was measured by the
16 software tool was in seconds.

17 Q. All right. Great.

18 In the far columns on the right, there's an
19 indication of desktop with In-Flight and desktop without
11:32:44 20 In-Flight.

21 Do you see that?

22 A. Yes.

23 Q. Do you have an understanding of what was being
24 referred to here?

11:32:49 25 A. Yes. The last column, without In-Flight, is the

1 way the software worked with the base Business One
2 software, the software that Hodell licensed from SAP.

3 The column just to the left of that with
4 In-Flight, it's for the base software plus the custom
11:33:13 5 add-on that was created by IBIS/LSi to add functionality
6 to the Business One software. And this was software, as
7 I say, developed for the customer, one-time basis, and
8 custom, and developed by IBIS/LSi; not by SAP.

9 Q. All right. Very good. Let's take a look at some
11:33:39 10 of the response times.

11 Let's just look at the first line item. I
12 don't have it highlighted in green, but it's tab out of a
13 line with 296 lines, and if we look at the far right
14 column, it says nine seconds with In-Flight, two seconds
11:33:54 15 without.

16 Can you explain to the jury what we're
17 seeing here and whether, in your opinion, any of these
18 response times are within normal industry standards of
19 that function?

11:34:05 20 MR. LAMBERT: Objection.

21 THE COURT: Overruled.

22 A. What that is, entering a line would be like putting
23 in the quantity, putting in the product number, observing
24 what was in stock and what was not in stock, maybe
11:34:21 25 adjusting the quantity to just order what was in stock or

1 to backorder some, so there's some work associated with
2 entering each, each line. And this is after the line is
3 entered, tabbing 1,000 one, 1,000 two to get to the next
4 line. Two seconds is entirely normal. Nine seconds
11:34:42 5 isn't bad. But it's not as fast as two.

6 Q. Okay. Let's look at the first green highlighted
7 item I have up there. Update a sales order with 296
8 lines, and it shows 766 seconds with In-Flight, 100 with
9 just Business One.

11:34:59 10 Can you explain what is being referred to
11 here and whether these response times are reasonable or
12 unreasonable based on industry standards?

13 A. Yes. A sales order would be a complete order, all
14 of the line items I've just described in the order.

11:35:17 15 Since we're talking almost 300 lines here,
16 this is a big order. In my experience, an order like
17 this would typically take an hour or multiple hours to
18 enter an order of that size because you have to look, you
19 know, you're not just bing, bing, bing, bing, bing, bing,
11:35:36 20 bing. You're going through and with each line, you're
21 ensuring that, you know, looking at the quantities and
22 ensuring that you entered the right product number, that
23 the right description pops up. And often this is done
24 over the phone with a client in my experience.

11:35:54 25 And so it could take hours to enter a 300

1 line item order. So this is the amount of time, once
2 you've entered those 296 lines, you say, okay, this order
3 is ready to be processed. And the processing is what
4 sets up everything to fulfill that order, setting up
5 a -- it doesn't actually set up the backorder, but it
6 queues everything that needs to be backordered to be
7 backordered. It sets up, if there are things going to
8 different "ship to" addresses, what's going to -- queues
9 everything to go to the "ship to" address.

10 There's a lot of processing, computer
11 processing that goes on at the end of that order.

12 766 seconds to do that, that, you know,
13 that's a long time. That's, what, 12 minutes, something
14 like that. But a minute and a half, a hundred seconds
15 after you spent two hours entering an order, to wait a
16 minute and a half for all that processing to be done,
17 that's entirely normal.

18 Q. Entirely normal, you say?

19 A. Yes.

20 Q. Not just reasonable, but entirely normal, in your
21 opinion?

22 A. That's what I would -- I would -- I would not
23 be -- find that to be unexpected and entirely normal.

24 Q. Okay. Let's just go through a couple other items.

25 Adding a one hundred line order, I think we

1 have a sense of what that means as far as what the user
2 would do. We see 60 seconds with In-Flight. 8.5 with
3 just Business One.

4 Do you have an opinion as to whether those
11:37:34 5 response times are reasonable or unreasonable within
6 industry standards?

7 A. 8.5 would be fine. 60 is not as good, but
8 basically it shows the effect of In-Flight on the
9 processing that's being done by Business One.

11:37:51 10 Q. Well, let's delve into that a bit.

11 What can you extrapolate from these
12 response times as far as the issues Hodell was suffering?

13 A. If I were the consultant to Hodell looking at this,
14 I would say, you know, In-Flight might not be a hundred
11:38:09 15 percent of the problem, but looking at the results with
16 In-Flight and without In-Flight, it sure looks like all
17 or almost all of the problem is coming from In-Flight;
18 not from Business One.

19 Q. And is the data that we see here in these
11:38:26 20 measurements on this document, is that the kind of data
21 that you would ordinarily use if you were consulting with
22 a customer to actually investigate a performance problem
23 and determine its root cause?

24 A. This is the type of data, yes.

11:38:37 25 Q. Okay. Let's take a look at another document.

1 A. This would allow me to pinpoint where the problem
2 is occurring.

3 It might not allow me to determine within
4 that one place what it is about the processing that's the
5 cause of the problem, but it would allow me to pinpoint
6 where the problem is.

7 Q. And when you look at this particular set of data
8 for this case, are you able to reach a conclusion as to
9 the pinpoint for the problems Hodell was having?

10 A. As I say, I can't reach the conclusion it is a
11 hundred percent In-Flight, but it sure looks like all or
12 almost all of the problem is with the In-Flight add-on.

13 Q. All right. Let's take a look at one more exhibit.
14 Bob, 166, please.

15 Mr. Hilliard, this is an e-mail the jury
16 has seen quite a few times. It's Mr. Neveux to
17 Mr. Killingsworth and others following a visit on October
18 16th, 2007. The e-mail is dated the 17th.

19 Bob, if you can just scroll down.

20 Mr. Hilliard, is this a document that you've reviewed in
21 reaching your opinions in this case?

22 A. I have.

23 Q. Okay. Sorry, Bob. Just go up a little bit so we
24 can see that paragraph above. All right. That's good
25 right there.

1 Have you reviewed Mr. Neveux's testimony in
2 this case?

3 A. I have, yes. Both his deposition and his trial
4 testimony, I've read both.

11:40:09 5 Q. Okay. So you read his trial testimony from last
6 week?

7 A. I did.

8 Q. Was it last week or the week before? I can't
9 remember.

11:40:15 10 He mentions in here something called the
11 Dot Net Profiler tool.

12 Are you familiar with what that is and what
13 Mr. Neveux did when he went to Hodell?

14 A. The Dot Net Profiler is a tool that's used to
11:40:32 15 measure various things, including response time of
16 systems.

17 I can't off the top of my head recall all
18 the -- all the functions, but it's a -- Dot net is a
19 Microsoft product, and this is a tool that
11:40:57 20 Mr. Neveux -- Neveux, used to do the measurements.

21 It's a different tool than was used in July
22 when Mr. Barnea and Mr. Guagenti were there.

23 Q. Based on your earlier testimony, is this the kind
24 of software tool that you would expect to be used in
11:41:12 25 order to measure response times in an ERP system?

1 A. Yes.

2 Q. Okay.

3 And Mr. Neveux, in the paragraph above,
4 reports that he used the Dot Net Profiler -- Dot Net
11:41:27 5 Profiler tool when doing order entry at Hodell and saw a
6 nine-second delay in the sales order entry process?

7 Do you see that?

8 A. Yeah, I think he said that was the worst case.

9 Q. Worst case. Based on your review of Mr. Neveux's
11:41:45 10 e-mail here, his testimony in this case, and the measured
11 results that you've seen, do you have an opinion as to
12 whether within the normal bounds of industry standards
13 the performance that Hodell was having on this computer
14 system as of October, 2007, whether that performance was
11:42:02 15 acceptable or unacceptable?

16 MR. LAMBERT: Objection.

17 THE COURT: Overruled.

18 A. For a worst case entering an order, I talked before
19 about how a hundred seconds for a 296-line order, if you
11:42:19 20 would expect the worst case he saw to be a large order,
21 not necessarily 296, but nine seconds for a large order
22 would be very much within the normal response times for
23 entering an order.

24 And that's the worst case. He doesn't say
11:42:39 25 that all the others were better, but generally there's a

1 Bell curve of best to worst.

2 Q. And based on your review of this document and
3 Mr. Neveux's testimony, is it your understanding that
4 these nine-second worst case scenario was when Hodell was
11:42:57 5 running Business One plus In-Flight plus Radio Beacon, or
6 was Hodell just running Business One alone?

7 A. I think it was with all three.

8 Q. And based on Hodell running all three programs in
9 October of 2007 and seeing, according to Mr. Neveux, a
11:43:14 10 worst case performance of nine seconds in entering a
11 sales order process, are you able to give an opinion as
12 to whether the performance of the heuristic system was
13 acceptable or unacceptable within normal industry
14 standards?

11:43:29 15 MR. LAMBERT: Objection.

16 THE COURT: Overruled.

17 A. Nine seconds was well within normal, the normal
18 range.

19 Q. Okay.

11:43:36 20 A. For worst case.

21 Q. For worst case, thank you. Have you also had a
22 chance to review any of the testimony from Joe Guagenti?

23 A. From -- Mr. Guagenti, yes.

24 Q. Okay. Did you have a chance to review his trial
11:43:48 25 testimony from last week?

1 A. I did.

2 Q. Okay.

3 Based upon everything you have reviewed,
4 are you able to offer an opinion within a reasonable
11:43:55 5 degree of professional certainty as to what, if anything,
6 was the cause of the performance problems that Hodell
7 complained about in this case?

8 A. I -- I think Mr. Guagenti laid it out pretty well,
9 and Mr. Neveux in his testimony also talked about it,
11:44:12 10 that the way this system was built was not built -- it
11 was built to emulate something that was designed for the
12 prior system, FACTS, rather than considering how -- how
13 Business One operates.

14 And as a result --

11:44:26 15 Q. Excuse me. Sorry to interrupt you.

16 When you say "the system," are you
17 referring to Business One or In-Flight?

18 A. In-Flight was designed originally to work with
19 FACTS, the prior system that Hodell had, and then
11:44:42 20 Mr. Guagenti, I believe, testified that he was told to
21 essentially port that to or recreate that for Business
22 One, the In-Flight, without considering the differences
23 between FACTS and Business One.

24 And he was aware that as a result of having
11:45:02 25 done that, there was sending a lot more data between the

1 client and the server than should have been sent.

2 And he knew that that had to be corrected,
3 but it never was.

4 Q. And from all of the evidence that you've seen, are
11:45:23 5 you able to tell this jury within a reasonable degree of
6 professional certainty what, if anything, was the root
7 cause of the problems Hodell complained about?

8 MR. LAMBERT: Objection.

9 THE COURT: Overruled.

11:45:32 10 A. It was the combination of this bloated,
11 misdesigned, poorly designed In-Flight add-on to the SAP
12 Business One software, not the SAP Business One software
13 itself.

14 Q. Okay. Is there any evidence that you've seen that
11:45:56 15 would take you to the opinion or conclusion that Business
16 One itself was a cause of any particular performance
17 problem for Hodell?

18 A. I can't rule out that there might have been some
19 minor contribution, but the overwhelming evidence, in
11:46:15 20 fact Mr. Neveux testified I believe that the way
21 Mr. Guagenti had designed the In-Flight add-on would
22 cause something like 700 transmissions for something that
23 ought to be done in one or maybe two, but most likely
24 one, so it was sending 700 times as much traffic across
11:46:39 25 those network lines that are from the 1980s that are

1 slow. Seven times -- 700 times or 350 times as much data
2 across those lines than ought to have been sent.

3 So when you put those together, there is
4 nothing that overwhelms that that's related to Business
5 One.

11:47:06

6 MR. STAR: Thank you.

7 No further questions for now, Your Honor.

8 THE COURT: You may cross-examine.

9 CROSS-EXAMINATION OF BROOKS HILLIARD

11:47:14

10 BY MR. LAMBERT:

11 Q. Good afternoon, Mr. Hilliard. Can you hear me
12 okay?

13 A. Good afternoon. Yes. Good morning, I guess,
14 still. Yes.

11:47:55

15 Q. We'll split the difference.

16 My name's Wes Lambert. We met before. I
17 took your deposition a few years ago. I'm not sure if
18 you recall.

19 A. Good to see you again.

11:48:08

20 Q. Likewise.

21 You're here testifying in this trial
22 obviously on SAP's behalf retained by the Drinker Biddle
23 firm, correct?

24 A. I'm testifying, I was engaged by Drinker Biddle.

11:48:23

25 I'm testifying pursuant to what they asked me to do.

1 I'm not an advocate for SAP. My -- my
2 responsibility is to Drinker Biddle.

3 Q. Drinker Biddle, we can agree, is here representing
4 SAP, SAP America and SAP AG in this litigation, right?

11:48:42 5 A. That's my understanding.

6 Q. Okay. And you're here at Drinker Biddle's request,
7 correct?

8 A. Yes.

9 Q. And you're being paid to render an opinion in this
11:48:53 10 matter, correct?

11 A. I'm being paid for having done the work and the
12 analysis and ultimately the -- coming up with a
13 conclusion and then rendering an opinion, yes.

14 Q. The materials that you've reviewed in connection
11:49:12 15 with this case, specifically, are solely those materials
16 given to you by SAP's law firm, correct?

17 A. I think I got them all through SAP's law firm. If
18 I asked for specific information, nothing was ever
19 withheld from me.

11:49:32 20 Q. You never have spoken with anyone at Hodell
21 relating to or in forming your opinions in this matter,
22 is that correct?

23 A. That's correct. I've just read their deposition
24 testimony.

11:49:55 25 Q. Never even been to Hodell's facilities, is that

1 correct?

2 A. That's correct.

3 Q. Never spoken with anyone at LSi-Lowery Systems,
4 Inc., is that correct?

11:50:06 5 A. I don't believe so, no.

6 Q. Never spoken with anyone at the IBIS Group,
7 correct?

8 A. Correct.

9 Q. And I think, and correct me if I'm wrong, my
11:50:15 10 understanding at least at the time, last time we spoke,
11 you thought you might have had some conversations with
12 people at SAP but you don't -- you can't give me any
13 names, is that right?

14 A. As of that time, that was true.

11:50:29 15 I've since spoken to Mr. Killingsworth
16 there, but I think he's the only one since then.

17 Q. And what was the nature of your discussion with
18 Mr. Killingsworth, just to keep it at a high level?

19 A. We talked about the users, the list of users on the
11:50:48 20 SAP Business One system.

21 Q. Is that the basis for your testimony that you
22 believe there's some number of users out in the world
23 that have more users using Business One than Hodell? You
24 testified about that earlier?

11:51:03 25 A. Well, that's one of the factors. It's certainly

1 not the whole basis, no.

2 Q. Other than Mr. Killingsworth, you didn't speak with
3 anyone else at SAP in the course of preparing your
4 opinion?

11:51:17 5 A. Not that I recall.

6 Q. You've never spoken with a single person in the
7 marketing department at SAP?

8 A. No.

9 Q. And you've never spoken with a single person on the
11:51:28 10 development team for the Business One product?

11 A. That's correct.

12 Q. Never spoken with a single person responsible for
13 managing the Business One channel, is that correct?

14 A. Correct.

11:51:52 15 Q. You're familiar, you testified earlier, you
16 reviewed Helmuth Guembel's testimony in this case?

17 A. Yes.

18 Q. He was on the stand and you reviewed what he said;
19 I presume you had his transcript?

11:52:04 20 A. That's correct.

21 Q. So you're familiar with Mr. Guembel's
22 qualifications to testify in this case?

23 A. Yes.

24 Q. And you're familiar --

11:52:11 25 A. To some extent. I don't remember everything

1 verbatim.

2 Q. So you don't remember everything Mr. Guembel said
3 in his testimony, is that your claim?

4 A. Don't remember everything verbatim.

11:52:21 5 Q. Okay. Well, you're familiar, are you not, that
6 Mr. Guembel has actually been hired by SAP dozens of
7 times to provide consulting services to SAP?

8 A. Yes.

9 MR. STAR: Objection. Relevance.

11:52:34 10 THE COURT: Overruled.

11 BY MR. LAMBERT:

12 Q. And you yourself, SAP has never actually hired you
13 to perform any consulting services for them, have they?

14 A. That's correct.

11:52:46 15 Q. In fact, if you reviewed Mr. Guembel's testimony,
16 you saw that SAP has paid him almost a million dollars
17 for his consulting services over the course of his
18 professional career.

19 Do you recall seeing that?

11:53:04 20 A. Yes. I'm aware that he's been paid a lot.

21 Q. SAP's again never retained your services to analyze
22 or discuss its ERP software, is that correct?

23 A. That's correct.

24 Q. And you are aware that Helmuth Guembel actually
11:53:31 25 published a Whitepaper specific to SAP Business One,

1 correct?

2 A. Yes.

3 Q. And that paper was published outside the context of
4 this litigation in 2006, correct?

11:53:44 5 A. Yes.

6 Q. Before this lawsuit, more than two years before
7 this lawsuit was even filed, correct?

8 A. I don't recall the date of filing, but I'll accept
9 your representation.

11:53:55 10 Q. And it was actually published a year before Hodell
11 even went live on the software, correct?

12 A. If it was 2006, depending on when during that year,
13 it would have been on the order of a year, yes.

14 Q. And am I correct that you actually have never
11:54:16 15 published any literature whatsoever on SAP Business One?

16 A. Yes. That's true.

17 Q. You are familiar with a company called Gartner,
18 correct?

19 A. I am.

11:54:28 20 Q. One of the leading consulting firms relating to ERP
21 systems and technology in the world, correct?

22 A. They're a well-known and respected firm, yes.

23 Q. And here you would have seen from Mr. Guembel's
24 testimony that he worked for Gartner for several years,
11:54:46 25 correct?

1 A. Yes.

2 Q. And he actually, while working at Gartner,
3 consulted directly with SAP on various projects, is that
4 correct?

11:54:59 5 A. Yes.

6 Q. And you haven't worked at Gartner, have you?

7 A. I have not.

8 Q. You'd agree with me that Mr. Guembel's interaction,
9 relationship with SAP, greatly exceeds any relationship
10 that you had with SAP?

11:55:14

11 A. In terms of direct relationship, yes.

12 Q. You testified that you've consulted with hundreds
13 of clients and reviewed potentially thousands of software
14 products; that was your testimony this morning?

11:55:36

15 A. I don't believe I said thousands of products this
16 morning.

17 I probably said on the order of a thousand
18 during my deposition, something like that.

19 Q. All right. Well, just go ahead and take credit for
20 it.

11:55:49

21 You've recommended FACTS for those clients,
22 right?

23 A. For some.

24 Q. And they've implemented FACTS?

11:55:55

25 A. Yes.

1 Q. And you've recommended Profit 21 for clients?

2 A. Yes.

3 Q. And they've implemented Profit 21, right?

4 A. Yes.

11:56:04 5 Q. And you said there was one client that you can
6 recall where you actually recommended Business One?

7 A. Correct.

8 Q. And that client actually didn't go through with the
9 implementation, correct?

11:56:16 10 A. They wanted to, but they had some business reverses
11 and did not.

12 Q. So that implementation did not happen?

13 A. Correct.

14 Q. And that client was a 40 to 50-user client,
11:56:29 15 correct?

16 A. Could have been in -- I don't remember the exact
17 range, but it was probably in that range with growth
18 potential, yes --

19 Q. Somewhere around 40 to 50?

11:56:41 20 A. -- beyond that.

21 Q. Right?

22 A. This was something that occurred probably seven
23 years ago. I don't remember the exact numbers, but my
24 recollection, it would be in that range with some growth
11:56:54 25 potential anticipated beyond that, yes.

1 Q. You testified a little bit today about your
2 experience and how you go about approaching engagements
3 like the one you're here on today.

4 Do you recall that testimony?

11:57:17 5 A. Engagements and the selection of software and
6 sizing of hardware, yes.

7 Q. Well, obviously to come in to testify today to the
8 jury, you had to have gone through some analysis that
9 you've done in the past, right?

11:57:33 10 A. Yes. But I had to go through a comparable
11 analysis, yes.

12 Q. This isn't your first time testifying as an expert,
13 right?

14 A. That's correct.

11:57:42 15 Q. And you've given lots of expert opinions, correct?

16 A. I have.

17 Q. So you would agree with me that ERP system
18 integrations are normally the most important factor for
19 warehouse management because software function is
11:58:08 20 critical from a business operation standpoint, do you
21 agree with me on that?

22 A. You say the most important?

23 It's certainly a very -- depending on the
24 context, it's a very important consideration, and it can
11:58:23 25 be crucial to a business.

1 Q. And you agree with me that from an operations
2 standpoint, ERP systems are critical to revenue
3 generation and the efficiency of the business itself,
4 correct?

11:58:40 5 A. It's important to have a properly functioning ERP
6 system in order to carry out your business without which
7 you can't generate revenue or profit, yeah.

8 Q. And you would agree with me that when a customer is
9 looking to acquire ERP software, they can look at the
11:58:59 10 system as a whole, correct? Not just the core ERP
11 system.

12 Would you agree with me on that?

13 A. I'm not sure exactly what you're asking.

14 Q. Would you agree with me that software, ERP systems
11:59:19 15 can't work to generate revenue and improve efficiency
16 unless it can integrate with other aspects of the
17 business to exchange data among various aspects of the
18 business?

19 A. Well, the ERP system generally covers most of the
11:59:33 20 aspects of the business.

21 It needs to support the operational
22 functions that it's designed to support. If there are
23 other systems to exchange data with, it needs to do that,
24 but the idea of an ERP system is that it supports all of
11:59:51 25 the basic operational and record keeping and accounting

1 functions of the business, so very often there aren't
2 other software applications that it needs to interact
3 with.

12:00:05 4 Q. And you would agree with me that ERP systems need
5 to be able to perform well in order to generate revenue
6 and improve efficiency, we can agree on that, right?

7 A. They need to support the required applications.
8 They need to support them adequately. And they need to
9 allow the customer who's using them to carry on their
12:00:28 10 business. If you can't carry on your business, you
11 can't -- you can't generate revenue and be profitable.

12 Q. You would agree with me in your experience, it's
13 custom and good practice to disclose significant problems
14 regarding software to existing and prospective clients if
12:00:53 15 there's good reason to believe those clients would be
16 affected by the same problems?

17 A. If there's good reason to believe they would be
18 affected, yeah, it's the general practice to disclose.

19 Q. Okay.

12:01:12 20 And if a project begins, an implementation
21 project begins, you'd agree with me it would be the
22 custom and good practice of the industry to disclose the
23 pre-existence of the problems at that time to allow the
24 clients to evaluate whatever options they might have to
12:01:26 25 eliminate or mitigate them, correct?

1 A. Only if the problems endanger the success or
2 imperil the success of the implementation.

3 Q. That's just good custom and practice, correct?

4 A. It would be normal custom and practice, yes.

12:01:54 5 Q. Mr. Hilliard, you correct me if I'm wrong, you've
6 actually never even used the Business One software
7 program, is that correct?

8 A. I've seen demonstrations of it, but I haven't been
9 the hands-on user.

12:02:12 10 Q. Never been the hands-on user and you don't have a
11 single client that's been a hands-on user of the system,
12 we can agree?

13 A. Yes, we already discussed that.

14 MR. LAMBERT: Your Honor, you want to take
12:02:30 15 a break now or keep going? I have awhile.

16 THE COURT: It's up to you. Would this be
17 a good time to do it?

18 MR. LAMBERT: Sure.

19 THE COURT: Okay. Then we'll do it. How
12:02:40 20 is that? 1:15, 1:20, thereabouts on L-1. I helped you
21 out, Mr. Panigutti, in case you forgot over the weekend
22 where you were supposed to go.

23 Keep in mind the admonition. We'll see you
24 at 1:20 or thereabouts. (Jury out)

12:03:13 25 (Proceedings adjourned at 12:03 p.m.).

1 MONDAY, JUNE 29, 2015, 1:18 P.M.

2 THE COURT: Be seated, folks.

3 You may continue.

4 CROSS-EXAMINATION OF BROOKS HILLIARD (RESUMED)

13:29:14 5 BY MR. LAMBERT:

6 Q. Good afternoon, Mr. Hilliard. How are you?

7 A. Good. How are you this afternoon?

8 Q. I'm doing well.

9 A lot of your testimony this morning was
13:29:24 10 premised on your experience in the field of marketing ERP
11 software, is that correct?

12 A. A good portion of it.

13 Q. But you haven't really actually been involved or
14 employed in the marketing of ERP software since the
13:29:40 15 1970s, isn't that correct?

16 A. I haven't been employed doing the marketing, but
17 I've been a customer of the marketing and closely
18 involved in it, but I haven't done it myself since then,
19 that's correct.

13:29:52 20 Q. You haven't done any marketing of ERP software
21 since the 1970s, we can agree on that, right?

22 A. Yes.

23 Q. And isn't it true that you've never actually -- you
24 haven't actually written a piece of software since the
13:30:05 25 1970s either, is that correct?

1 A. That's correct.

2 Q. I want to talk a little bit about your work at
3 Business Automation.

4 Business Automation is a consulting firm?

13:30:16 5 A. Yes.

6 Q. And on its website it lists out, you know, a series
7 of things, I think four categories of services it
8 performs?

9 A. Yes.

13:30:26 10 Q. And one of those is expert testimony, correct?

11 A. Yes.

12 Q. And isn't it true that over the last five years,
13 you've actually spent very little time selecting or
14 assisting customers in the selection of ERP software?

13:30:42 15 A. That -- that's correct.

16 Q. And, in fact, 90% of your time is spent as a paid
17 expert here testifying in trials, isn't that true?

18 A. Well, about 90% of my revenue comes from expert
19 work. Most of that is analysis and so forth.

13:31:03 20 I'm fortunate there's a good demand for
21 that.

22 Q. Okay. But I'm correct in stating here today that
23 90% of your time is spent as an expert witness and very
24 little time is spent actually selecting ERP systems with
13:31:23 25 customers, true?

1 A. It's hard to make time for the -- the consulting,
2 so, yes, most of my -- most of my work these days is the
3 expert work.

13:31:41

4 Q. You're familiar with the ERP System of the Year
5 Award?

6 A. I don't recall that particular award.

7 Q. Is it -- is it accurate, is it still accurate that
8 you haven't really had any speaking engagements with
9 respect to ERP systems since the 1990s.

13:31:59

10 A. No. I've had a few speaking engagements since
11 then, but I don't do a lot of speaking these days
12 professionally as I did.

13 Q. So you might have had a couple speaking engagements
14 in the last 20 years with respect to ERP systems?

13:32:16

15 A. More than a couple.

16 If, for the last 20 years, no. Fairly more
17 than a couple, a good deal more than a couple.

18 Q. You testified a little bit this morning about the
19 use in the industry of software vendors like SAP
20 partnering with companies like LSi to sell their
21 software, is that correct?

13:32:42

22 A. That -- that sell licenses, yes.

23 Q. Okay. And we can agree, sir, that you're not a
24 lawyer, right?

13:32:57

25 A. That's correct.

1 Q. And you're not -- you don't have any formal legal
2 training?

3 A. That's correct.

4 Q. Right?

13:33:04 5 And really, the extent of the authority
6 that you cited for that opinion in your report was a
7 Wikipedia article, wasn't it?

8 A. Which opinion?

9 Q. Your opinion regarding the partnering of software
13:33:22 10 vendors and companies like LSi.

11 A. Well, I was trying to establish what the common
12 understanding of something is.

13 Q. And you cited Wikipedia for that?

14 A. Wikipedia is a very good source for
13:33:35 15 understanding -- for determining common understanding of
16 something. It's not necessarily accurate for facts, but
17 in terms of common understanding, it's an excellent
18 source.

19 Q. It's not accurate for facts is what you said but
13:33:48 20 it's good for common understanding?

21 A. If what you're trying to determine is --

22 Q. That's what you just said?

23 A. -- the common understanding of a term, Wikipedia
24 explains those sorts of things very well.

13:33:59 25 If you want to drill down into specific

1 analyses of things, sometimes Wikipedia is accurate,
2 sometimes it isn't. But for common understandings, it's
3 a very good source.

13:34:17 4 Q. With regard to overall system performance of an ERP
5 system, you'd agree with me that whether the system
6 provides adequate response times is largely dependent
7 upon the business needs of the customer, correct; the
8 customer being the end user of the ERP system?

9 A. What is adequate for a particular application is
13:34:35 10 dependent on that application.

11 Certain, certain functions have different
12 needs in terms of adequate or normal response times.

13 Q. And different customers, you would certainly agree
14 with me, have different needs with respect to response
13:34:51 15 times, correct?

16 A. Conceivably.

17 Q. You testified generally about some of the marketing
18 literature that's been displayed in this case.

19 Do you recall that?

13:35:12 20 A. Yes.

21 Q. There was an Exhibit 314 that you testified about?

22 A. I believe so. That number's familiar, yes.

23 Q. And just so we're all clear here today, you didn't
24 speak with a single person at SAP about what SAP meant
13:35:29 25 when it wrote that?

1 A. No. As I told you before, I haven't.

2 Q. And you didn't seek out the author of that
3 marketing literature to see what that author thought when
4 it was writing that particular piece of marketing?

13:35:45 5 A. Correct.

6 Q. Am I correct that you haven't conducted a single
7 survey of public opinion as to what the public, general
8 public might think when reviewing the information
9 contained in that exhibit, is that correct?

13:36:01 10 MR. STAR: Objection, Your Honor.

11 THE COURT: Overruled.

12 A. I --

13 Q. Did you conduct a survey? I haven't seen one in
14 your report.

13:36:10 15 A. I haven't done surveys of general public.

16 Q. You're giving your personal opinion as to what you
17 think when you read that?

18 A. No, sir.

19 Q. I haven't seen any information provided about what
13:36:22 20 anybody else thinks about that piece of marketing
21 literature besides yourself.

22 A. What I said was up among the buyers and sellers of
23 computer systems in my experience, and I've had direct
24 interaction with hundreds of buyers and sellers of
13:36:38 25 computer systems, and in my experience this is what they

1 understand those things to mean.

2 Q. But you're not here to testify and you can't
3 testify about what SAP meant because you didn't speak
4 with anybody at SAP, right? Did you speak with anybody
13:36:57 5 at SAP?

6 A. I have an opinion of what they meant based on my
7 experience with buyers and sellers.

8 I didn't talk to anyone at SAP.

9 Q. Okay. Kim, can you pull up 618.7?

13:37:15 10 This is one of the pieces -- this is one of
11 the items that you were testifying about, you gave your
12 opinion as to what you thought the information in this
13 piece of marketing literature meant, is that correct?

14 A. I -- this is one of the items that I looked at,
13:37:30 15 yes.

16 Q. And this is a technical Whitepaper, right? This
17 isn't just -- it provides pretty technical information
18 regarding Business One, wouldn't you agree?

19 A. Yes.

13:37:38 20 Q. And you didn't seek out the author of this SAP
21 Business One Whitepaper and ask the author's opinion of
22 what they meant when they wrote anything in here, is that
23 correct?

24 A. I -- no, I just looked at what the plain meaning of
13:37:56 25 one sentence following the next was.

1 Q. Okay. And you were testifying about the Microsoft
2 SQL server reference in this document?

3 A. Yes.

4 Q. And you're experienced generally with regard to the
13:38:09 5 Microsoft SQL server, correct?

6 A. I'm knowledgeable about Microsoft SQL server, yes.

7 Q. But you've never actually used the Microsoft SQL
8 server in connection with SAP Business One, have you?

9 A. I've had clients that have had Microsoft SQL
13:38:28 10 server-based systems.

11 Q. But never on Business One --

12 A. I haven't myself.

13 Q. Never on Business One because you've never actually
14 had a client use Business One?

13:38:34 15 A. That's correct.

16 Q. You testified that a company you thought might have
17 60 or 70% of its workforce, of it's employees be actual
18 users of the system, do you recall that?

19 A. Yes.

13:38:58 20 Q. So one of the marketing pieces you saw stated that
21 whether you have 10 to several hundred employees,
22 Business One is an affordable solution for your business.

23 Do you recall that?

24 A. I -- I don't recall whether you're quoting it
13:39:17 25 exactly, but I recall something to that --

1 Q. Well, you could agree that assuming that several
2 hundred meant 200, 60 to 70% of those employees being
3 users means that the software could support up to 130
4 users, correct?

13:39:36 5 MR. STAR: Objection.

6 THE COURT: Overruled.

7 A. I'm sorry. Are you asking me to assume that
8 several hundred meant 200? I'm -- what's the basis for
9 the assumption of 200?

13:39:48 10 Q. I'm just -- let's use the lower end of several
11 hundred.

12 A. Okay.

13 Q. 200?

14 A. At 200, it would be 130.

13:39:56 15 Q. Right.

16 A. At 600, it would be 400.

17 Q. Right. And, Kim, can you pull up Exhibit 69. I
18 think we want to go to 69.3 or something like that. I
19 should know that. There we go.

13:40:14 20 So based on that marketing literature, 60
21 to 70% of employees being users would mean that 130 users
22 would be able to use that system, right?

23 A. If you use the assumption of 200.

24 Q. Right.

13:40:35 25 A. Which I don't know that that's necessarily a valid

1 assumption, but under that assumption, yeah.

2 Q. And if we go to Mr. Ziv's e-mail on 69, he says,
3 "120 users is way above any sane Business One Sweet
4 Spot."

13:40:51 5 Correct?

6 A. That was his reaction on that date, yes.

7 Q. And you don't have any reason to disagree with
8 Mr. Ziv, correct? He's the head of the development team
9 for the Business One software.

13:41:03 10 A. Well, I don't have any reason to disagree with him
11 in total when you consider how he described that in his
12 testimony, his recorded testimony here in court and his
13 deposition.

14 If you take this out of context, I would
13:41:17 15 say you ought to look at the context of what he said when
16 he explained this in his deposition.

17 Q. Yeah, I mean we've all heard what he said. You
18 didn't call him and speak with him, did you?

19 A. I did not.

13:41:26 20 Q. Okay. And aren't you aware that he testified that
21 he admitted he wrote that and that he never changed his
22 opinion?

23 A. He admitted that he wrote that, and he explained
24 why he wrote that, and he -- he gave a lot of nuance
13:41:42 25 after thinking it over, which really to my understanding,

1 he said that that was an immediate reaction and that
2 there were a lot of other factors that would have to be
3 considered.

4 So --

13:42:00 5 Q. Are you aware with who -- with who Mr. Ziv spoke
6 with before he wrote that e-mail?

7 A. It was -- well, it was in response to an e-mail
8 from Mr. Kraus.

9 Q. Aren't you aware of -- I mean, aren't you aware
13:42:22 10 that he testified that he would have at least spoken with
11 Dirk Boessmann before responding to that e-mail?

12 A. I -- I don't recall that specifically. I --

13 Q. Oh, you don't recall that part, okay.

14 If you look at Exhibit 69, you were talking
13:42:36 15 a lot about the Sweet Spot. Do you recall that?

16 A. Yes.

17 Q. And how that's just a marketing term?

18 A. Yes.

19 Q. Mr. Ziv doesn't use that as a marketing term,
13:42:44 20 right?

21 A. Pardon me?

22 Q. Mr. Ziv is not using that as a marketing term. He
23 says, "They're way above any sane Business One Sweet Spot
24 and obviously they're experiencing severe performance
13:42:54 25 issues."

1 Isn't that what Mr. Ziv said?

2 MR. STAR: Objection.

3 THE COURT: Overruled.

13:43:01

4 A. He said what he said. I'm not disputing what he
5 said.

6 I think you have to take it in context of
7 everything he said.

13:43:13

8 Q. You mean, you want to take in context that, "We
9 need to debrief the whole process that got us to having
10 this customer in the first place"?

11 Is that part of the context?

12 A. No, the context of when he was asked about this
13 during his deposition is what I was referring to.

13:43:29

14 Q. You mentioned some testimony about Paul
15 Killingsworth telling you about other Business One
16 customers that might be bigger than Hodell?

17 A. I believe I --

18 Q. Is that what your testimony was?

13:43:40

19 A. -- I remember talking with Mr. Killingsworth about
20 that, yes.

21 Q. And that was part of the basis of your opinion?

22 A. Well, that supports -- it supported my opinion.

13:43:54

23 The opinions that I wrote that you asked me
24 about in the deposition were based on documentary
25 evidence, and that supports it, also.

1 Q. Okay. Well, you don't have any knowledge
2 whatsoever about the companies that he was talking about,
3 is that correct?

13:44:06

4 A. I have knowledge about some of them from my
5 discussions with him.

6 Q. You don't have any personal knowledge as to how
7 they're using the software, is that correct? Personal
8 knowledge about how they were actually using the
9 software.

13:44:16

10 A. By personal knowledge, you mean talking to the
11 companies myself?

12 Q. Yes.

13 A. I did not talk to the companies myself.

13:44:27

14 Q. You don't know how the licenses were implemented at
15 any of those customers, correct?

16 A. Well, no, that's not true.

17 I do. Mr. Killingsworth testified that at
18 least two of the distribution customers that are
19 considerably larger than Hodell were --

13:44:40

20 Q. I'm talking about your knowledge, sir.

21 A. Pardon me?

22 Q. I'm talking about you're the expert on the stand.
23 I want to know what you personally know.

13:44:48

24 MR. STAR: Objection. He's in the middle
25 of answering the question.

1 THE COURT: Objection sustained.

2 You can answer.

3 A. What I was saying is what I personally know is a
4 couple things. What Mr. Killingsworth testified in this
13:45:01 5 Court when I read his deposition about two distribution
6 companies, both with more users than Hodel that had
7 implemented the SAP Business One software on single
8 server environments.

9 And then I talked to him, he had -- he had
13:45:21 10 done some further research after that where he had people
11 at SAP talk to other users and the vast majority of the
12 ones, and he picked out ones, I think, between 60 and 300
13 users, and the vast majority of those that he was able to
14 talk to were also using it on single server systems.

13:45:42 15 Q. You're relying upon second and third-hand
16 information for that testimony you just gave, right?
17 You're not -- you don't have actual facts to back that up
18 besides what other people have told you, is that correct?

19 A. I -- I do. Part of what any expert does is
13:45:58 20 research, is talk to people and rely on some of the
21 things they say. That's the nature of doing research as
22 an expert.

23 Q. You testified about some performance tests that
24 other people prepared.

13:46:13 25 Do you recall that?

1 A. I testified about some of the performance -- the
2 documented performance results, yes.

3 Q. Okay. Let's go to 442, first. That was one of the
4 ones you were talking about.

13:46:25 5 Do you recall that document? It's up on
6 your screen.

7 A. I don't know. I don't recall this particular page
8 of this document having come up in my direct testimony,
9 but I've seen this.

13:46:44 10 Q. Well, Kim, can you go to the next page or maybe
11 further back?

12 A. This is 442. I think you asked for 443, if I'm not
13 mistaken.

14 Q. Well, Gadi Barnea is the one that performed the
13:46:56 15 tests with the chart that you were referencing, is that
16 correct?

17 A. Yes.

18 Q. And you've never actually spoken with Gadi Barnea,
19 right?

13:47:03 20 A. Correct.

21 Q. And you don't -- you didn't run the test yourself,
22 we can agree on that?

23 A. No. I did not.

24 Q. And you weren't there when the tests were run,
13:47:12 25 correct?

1 A. That's correct.

2 Q. And you are just assuming that those results you
3 reviewed were accurate? You have to assume that, right?

4 A. I -- they're the only tests that were done. I
13:47:25 5 relied on them.

6 Q. But you're assuming they were accurately reported,
7 correct?

8 A. Yes.

9 Q. And you have to assume that Gadi Barnea did the
13:47:32 10 tests correctly, correct?

11 A. Pardon me?

12 Q. You have to assume that Gadi Barnea actually did
13 the tests correctly because you didn't do them yourself?

14 A. Well, he's testified about that under oath, and I
13:47:42 15 assumed that he did them -- that he used the testing
16 software that he said he used and he published the
17 results from that testing software accurately.

18 Q. Sir, Gadi Barnea hasn't testified in this case.

19 A. Then perhaps it was Mr. Guagenti who was with him
13:48:02 20 or what have you, but I'm assuming that the written

21 documentation of the results of that test was an accurate
22 representation of the results that were done with the
23 testing tool.

24 Q. And you've certainly never done any of these tests
13:48:17 25 yourself, have you?

1 A. Correct.

2 These tests, you mean at Hodell?

3 Q. With Business One, you've never done any tests at
4 Business One?

13:48:27 5 A. I have not.

6 Q. Correct?

7 A. Correct.

8 Q. Kim, can you pull up 166?

9 This was Mr. Neveux's e-mail that you were
13:48:42 10 testifying about, correct?

11 A. Correct.

12 Q. And Mr. Neveux did testify. He's one of the people
13 whose testimony you reviewed, is that accurate?

14 A. Yes, I did review his trial testimony.

13:48:56 15 Q. You didn't -- on direct examination, you didn't
16 note that Mr. Neveux stated that it was a slow day for
17 Hodell?

18 I don't recall you mentioning that?

19 A. He -- he testified he was told it was a slow day.
13:49:10 20 This was a day that, as I understand it, he was told to
21 be there for a demonstration. It was -- and he was told
22 that it was a slow day. He wasn't able to say one way or
23 another from his own knowledge.

24 Q. But that's what he reported back to Paul
13:49:25 25 Killingsworth, we can agree on that?

1 A. He put "Slow" in quotation marks as you'll note to
2 indicate that that's what he was told.

3 Q. Okay. And you just decided to disregard that in
4 your testimony, not give that any credence?

13:49:40 5 A. I didn't disregard that.

6 The results that we have are the only
7 results that are available. There are no other results.
8 I looked at the results that existed.

9 Q. On that slow day, that one day out of many that
13:49:51 10 Hodell was using Business One, you decided to use this
11 one?

12 A. The one day when Hodell advised Mr. Neveux that he
13 should come in and see it run, and then was told it was,
14 quote, a slow day, yeah.

13:50:07 15 These are the tests that were run, and
16 they're the only data we have. If there were other data,
17 I would look at all the data.

18 Q. You didn't personally speak with Mr. Neveux about
19 these tests, is that correct?

13:50:18 20 A. I did not.

21 Q. Okay. And you weren't there when the tests were
22 run?

23 A. Correct.

24 Q. And you weren't -- you were just assuming that they
13:50:26 25 were accurately done?

1 A. I'm assuming that he used the tools he said that he
2 used, and that these tools produced accurate results, and
3 that he described the results that the tools produced
4 accurately, yes.

13:50:40 5 Q. And you've never used the Dot Net Profiler that
6 Mr. Neveux was using here for SAP Business One, we agree
7 on that?

8 A. If I needed to use it, I would hire someone to do
9 that. I wouldn't be doing it myself.

13:50:52 10 Q. Okay. Now, we agree that both 442 and Exhibit 166
11 are one day in time, correct? They were there for one
12 day?

13 A. Well, each one of them is one day. They're two
14 separate days.

13:51:07 15 Q. Two total days, right?

16 A. Yeah, separated by about four months if I recall.

17 Q. Out of the 25 months that Hodell was running
18 Business One, correct?

19 A. They're the only days for which we have data.

13:51:17 20 Q. Well, we do have some additional data, don't we?
21 Can we turn to --

22 MR. LAMBERT: Your Honor, may I approach?

23 THE COURT: Sure.

24 Q. Sir, can you turn to Page 426.5 of that document?

13:51:43 25 MR. STAR: What document?

1 A. This is Exhibit 426.

2 MR. LAMBERT: 426.

3 Q. You had this e-mail in your possession or you could
4 have reviewed it in the course of preparing your opinion,
13:52:00 5 is that correct?

6 A. Yes.

7 Q. And this is actually after Mr. Neveux's e-mail you
8 were just talking about, correct?

9 A. It's dated, yes, October 18th.

13:52:18 10 Q. And you are familiar with Ralf Mehnert-Meland, I'm
11 sure?

12 A. I recognize his name, yes.

13 Q. He's a former SAP employee, correct?

14 A. Yes.

13:52:29 15 Q. And, you know, he -- this is some data that we
16 have. "They are having an abysmal performance which is
17 essentially an issue of the number of transactions they
18 run with the SAP Business One."

19 Do you see that?

13:52:43 20 A. I see that. I don't see any numbers there.

21 Q. You would agree with me that abysmal performance
22 isn't industry-standard performance, is it, sir?

23 A. You -- I would expect that performance be better
24 than abysmal, but I would certainly like to see data.

13:53:09 25 And it also doesn't say whether this is with or without

1 the In-Flight and Radio Beacon running.

2 Q. It does say it's the number of users/transactions
3 that they run with SAP, isn't that what it says right
4 there in plain English?

13:53:24 5 A. He says it's not a Citrix issue. He doesn't say
6 whether it's Business One solely as Mr. Neveux segregates
7 gates it or Business One with the In-Flight software that
8 was creating 700 times as much network traffic as it
9 needed to.

13:53:44 10 Q. Well, we'll get to that, but we can agree that this
11 was a piece of data that you had at your disposal when
12 you rendered your opinion, correct?

13 A. I would call this an account. I wouldn't call it a
14 piece of data, but certainly it's an account that I had
13:54:00 15 at my disposal and that I saw.

16 Q. Okay. Let's turn to another account you had.
17 Go to 426.2 of that document.

18 A. 426.3?

19 Q. 2.

13:54:11 20 A. 2. Okay.

21 Q. Actually the e-mail that I'm referencing spills
22 over on the next page, but you see the e-mail from Paul
23 Killingsworth down at the bottom there? That's one of
24 the individuals you spoke with?

13:54:30 25 A. Yes.

1 Q. In preparing your opinion, right?

2 A. Yes.

3 Q. So you felt comfortable relying upon what he told
4 you particularly with regard to other Business One
13:54:38 5 customers?

6 A. Yes.

7 Q. Right. And if you go to the next page, he's
8 sending an e-mail to several folks regarding Hodell. And
9 if you see here, again, after the Neveux e-mail,
13:54:54 10 "terrible performance," correct?

11 A. That's what he says.

12 Q. Okay.

13 A. That's what it says.

14 Q. And you would agree with me that "terrible
13:55:05 15 performance" is not industry standard, correct, sir?

16 A. One would hope that performance would be better
17 than terrible, of course.

18 Q. And Paul Killingsworth's the only person at SAP
19 that you've ever spoken with about this case, is that
13:55:19 20 correct?

21 A. That's correct.

22 Once again, though, he doesn't make the
23 distinction between with and without the In-Flight
24 add-on.

13:55:32 25 MR. LAMBERT: May I approach, Your Honor?

1 THE COURT: You may.

2 MR. LAMBERT: Handing up Exhibit 264.

3 A. This is 264?

13:55:52

4 Q. Yes. 264 is another e-mail that you had at your
5 disposal, isn't that correct, sir?

6 A. I -- I believe so. You know, in my report, I
7 identify them not by exhibit numbers but by the Bates
8 Number SAP 00005351 at the bottom, so I believe this is
9 one I saw.

13:56:14

10 Q. Okay. And there's an e-mail up at the top of the
11 first page from Michael Sotnick, do you see that?

12 A. Yes.

13 Q. And then if you flip over to 264.2, there's a
14 continuation of Mr. Sotnick's e-mail to several folks.

13:56:40

15 Do you see it at the top?

16 A. This is a --

17 Q. Team, this account has my personal attention?

18 A. This is a different e-mail from the one at the top
19 of 264.1, but I do see it, yes.

13:56:51

20 Q. Okay. That's an e-mail from Michael Sotnick and
21 he's with SAP, correct?

22 A. Yes.

23 Q. And he is stating in November, 2007, "I've been to
24 their facility and have seen firsthand the pain they are
13:57:04 25 in."

1 Do you see that?

2 A. Yes.

3 Q. And he's writing this over a month after
4 Mr. Neveux's e-mail that you were testifying about, isn't
13:57:12 5 that correct?

6 A. Yes.

7 Q. And you would agree with me that a customer being
8 in pain isn't standard industry, acceptable industry
9 performance, is it?

13:57:23 10 A. I have never doubted that Hodell was dissatisfied.

11 Q. You testified earlier about In-Flight.

12 Do you recall that?

13 A. Pardon me?

14 Q. You testified earlier today about the In-Flight
13:57:39 15 software?

16 A. Correct.

17 Q. And your testimony was based upon testimony that
18 you reviewed from Mr. Joe Guagenti that he gave in this
19 trial?

13:57:51 20 A. Mr. Guagenti and Mr. Neveux, also.

21 Q. Okay. And, Kim, can you pull up 307.3? I don't
22 have a copy of it. And you might need to cycle through
23 the whole thing for Mr. Hilliard to get a feel for the
24 document since it wasn't shown to him earlier.

13:58:17 25 A. It's too small to read.

1 Can you give me a paper copy of this that I
2 can look at?

3 Q. I don't have a paper copy, but I can -- I can have
4 her zoom in on the first page, perhaps.

13:58:30 5 A. Is -- okay. This is -- let's --

6 MR. STAR: We will get a paper copy.

7 Q. Sir, Exhibit 307, is an e-mail that you might have
8 seen Mr. Guagenti testifying about on Friday.

9 Do you recall his testimony on that
13:59:18 10 document?

11 A. I don't. Ask me specifics. I don't necessarily
12 recall testimony with regard to a particular exhibit, but
13 if there's specifics, I can try and remember them.

14 Q. Do you recall, this document would have been
13:59:43 15 available to you in your review and preparation of your
16 opinions, is that correct?

17 A. Yes.

18 Can I look at the -- this e-mail you're
19 showing me is the last one in a string. Can I take just
13:59:52 20 a moment to look at the ones that preceded that?

21 Q. Sure. I think it's all one e-mail, but I could be
22 wrong.

23 A. Well, no, if you look to Page 4, there's an e-mail
24 from Mr. Killingsworth, I believe, or from
14:00:07 25 Mr. Killingsworth to Mr. Kraus.

1 Q. You know what? You're right. I'm just going to
2 ask about Mr. Guagenti's e-mail, though, but you're free
3 to read as much as you'd like.

14:00:29

4 A. I want to see the context of Mr. Guagenti's e-mail,
5 if you don't mind.

6 Okay. What's your question?

7 Q. Well, my question on Page 307.3, do you see
8 Mr. Guagenti telling SAP that he's done everything that
9 Mr. Neveux's recommended?

14:01:24

10 A. Yes. Where he says, "I've seen some nice increases
11 in performance because of these changes"?

12 Q. He's referencing In-Flight?

13 A. Yes.

14:01:39

14 Q. Did you take that into account in preparing your
15 opinion?

16 A. I -- I took that into account, but I believe
17 there's also testimony that contradicted that, that there
18 were still things he knew he needed to work on.

14:01:52

19 Q. So you're referencing Mr. Guagenti's testimony
20 where he admitted that he actually wasn't being accurate
21 here, right?

22 A. I -- I don't recall that specific wording, but I do
23 recall him saying that there were things he still needed
24 to do that -- to address the issues that Mr. Neveux had
14:02:08 25 pointed out.

1 Q. Which would mean that he's not being accurate in
2 this e-mail he's writing, right? That's what he admitted
3 in his testimony?

4 MR. STAR: Objection.

14:02:15 5 THE COURT: Objection sustained.

6 Q. And Mr. Guagenti is one of the people that --

7 A. I don't remember the phrase "I'm not being
8 accurate," but I do remember him saying, explaining that
9 this wasn't accurate.

14:02:27 10 Q. Okay. And you're relying upon him for your
11 testimony, is that correct?

12 A. In part.

13 Q. You also relied upon Mr. Guagenti with respect to
14 some testimony you gave on some cabling that was at
14:02:42 15 Hodell-Natco's facilities?

16 A. I believe Ms. Weissman also, there was some
17 testimony, deposition testimony by Ms. Weissman --

18 Q. She hasn't testified here.

19 A. Yes, I know, but I relied on the deposition
14:02:56 20 testimony of Ms. Weissman in addition to Mr. Guagenti.

21 Q. The only -- the only trial testimony that you could
22 reference was Mr. Guagenti's, correct?

23 A. Correct.

24 Q. The author of this inaccurate e-mail?

14:03:07 25 MR. STAR: Objection.

1 THE COURT: Overruled.

2 A. Same Mr. Guagenti.

3 Q. Yeah. And did you take into account Mr. Guagenti's
4 testimony acknowledging that he wasn't even qualified to
14:03:20 5 analyze a customer's hardware and network infrastructure?

6 MR. STAR: Objection. Misstates the
7 testimony.

8 THE COURT: Overruled.

9 A. I took into account that he didn't consider himself
14:03:30 10 an expert, but that wouldn't mean that he wasn't able to
11 tell the difference between different kinds of cabling.

12 BY MR. LAMBERT:

13 Q. Did you take into account that he used the words
14 "Not qualified" in his deposition?

14:03:43 15 A. Well, let's look at the actual wording of the
16 question to him, because I think what he was indicating
17 was he wasn't qualified as an expert in that area, but
18 that, that didn't necessarily mean he wasn't qualified to
19 tell the difference between old cable that had a very
14:03:59 20 small capacity and new cable, current, up-to-date cable,
21 that would have much larger capacity.

22 You don't have to be an expert to tell
23 that.

24 Q. You have no personal knowledge of what he really
14:04:11 25 knew or didn't know, right? You're just relaying upon

1 the veracity of his testimony, is that accurate?

2 A. I'm -- well, no, I'm relying on him and
3 Ms. Weissman who saw that this was old cable, and I'm
4 familiar with this old cable. It's the kind of cable
14:04:27 5 that FACTS used that doesn't have near the throughput of
6 cable that was current in the nineties and certainly not
7 in the 2000s.

8 Q. Sir, are you aware of actually what cable Hodell
9 actually used to connect its IT infrastructure at the
14:04:46 10 time it was using Business One, or are you just relying
11 upon what you heard second and third hand from other
12 people?

13 A. I'm relying on the testimony of individuals who saw
14 the cable.

14:04:56 15 Q. Including Joe Guagenti, is that correct?

16 A. And Ms. Weissman, yes.

17 Q. You testified a little bit about Mr. Guembel's
18 opinion on two-tier architecture, do you remember that?

19 A. Yes.

14:05:19 20 Q. And do you agree with me that not -- not all
21 two-tier architectures are the same, is that accurate?

22 A. Well, Mr. Guembel's graph of two-tier architecture
23 is a graph of -- is an accurate graph of -- or diagram of
24 what a two-tier architecture is.

14:05:44 25 As you go down to greater and greater

1 detail, one system with two-tier architecture could be
2 somewhat different than another so they are -- to that,
3 it depends on what level you look at it.

4 The level that he illustrated with his
14:06:00 5 diagram is accurate for most any two-tier architecture.

6 Q. But the short answer to my question is not all
7 two-tier architectures are the same, is that correct?

8 A. Depending on what level you look at it, that's
9 correct.

14:06:15 10 Q. Okay. And Mr. Guembel was not providing an
11 analysis of the two-tier architecture that R/3 used,
12 right?

13 A. R/3 does not use two-tier architecture.

14 Q. R/2, I'm sorry.

14:06:31 15 A. He was talking about two-tier architecture in
16 general.

17 He didn't make a distinction between --

18 Q. He was talking about the two-tier architecture for
19 Business One, wasn't he?

14:06:40 20 MR. STAR: Judge, when he asks him an open
21 ended question --

22 THE COURT: Yeah, you should let him
23 finish.

24 A. He did not make any distinction between the
14:06:49 25 two-tier -- he said two-tier architecture regardless, and

1 he was actually referring to two-tier architecture that
2 was described in a paper dated 1995, before Business One
3 was even called Business One.

14:07:09 4 So -- and when R/2 was a very popular
5 product.

6 So he was talking about what -- what
7 Mr. Guembel was talking about was related to two-tier
8 architecture in general, and because of what he relied
9 on, couldn't have been referring specifically to Business
14:07:24 10 One.

11 Q. Well, let me ask you a question about that article.

12 You testified about that Carnegie Mellon
13 article. Is that what you were talking about?

14 A. The Schussel?

14:07:33 15 Q. No, the Carnegie Mellon article that said
16 "performance degrades as the number of users exceeds
17 100"?

18 A. Well, I looked at that one and I looked at the
19 source for that one, which was the Schussel.

14:07:45 20 Q. And in your report, I didn't see a single citation
21 to any other publication that contradicts that.

22 Did you cite any other publication in your
23 report; yes or no?

24 A. No. I gave examples of two-tiered architecture
14:08:02 25 system that contradicted.

1 Q. You didn't cite a single publication in your report
2 that contradicted the Carnegie Mellon article, did you,
3 sir?

4 A. No, I cited examples.

14:08:13 5 MR. LAMBERT: Thank you.

6 I don't have any further questions.

7 THE COURT: Any redirect?

8 MR. STAR: No questions, Your Honor.

9 THE COURT: Thank you, sir. You are
14:08:25 10 excused.

11 (Witness excused)

12 THE COURT: You may call your next witness.

13 MR. KELLEHER: Your Honor, SAP calls Geoff

14 Osborne.

14:09:26 15 THE COURT: Sir, would you raise your right
16 hand for me?

17 GEOFFREY OSBORNE

18 of lawful age, a witness called by the DEFENSE,

19 being first duly sworn, was examined

14:09:30 20 and testified as follows:

21 THE COURT: Please have a seat.

22 THE WITNESS: Thank you.

23 THE COURT: If you would, sir, would you
24 tell us your full name and spell your last name?

14:09:40 25 THE WITNESS: I'll be glad to. It's

1 Geoffrey. Let me spell the first name. It's with a G,
2 G-E-O-F-F-R-E-Y, last name is Osborne, O-S-B-O-R-N-E.

3 THE COURT: Thank you.

4 DIRECT EXAMINATION OF GEOFFREY OSBORNE

14:09:56 5 BY MR. KELLEHER:

6 Q. Good afternoon, Mr. Osborne.

7 A. Good afternoon.

8 Q. Could you please introduce yourself to the jury?

9 A. Again, I'm Geoff Osborne, and I'm a retired partner
14:10:06 10 from PricewaterhouseCoopers.

11 Q. So, sir, I'd like to start asking you questions
12 about your background.

13 Can you tell the jury where you went to
14 school and what you did?

14:10:19 15 A. Certainly. I have an undergraduate degree,
16 Bachelor of Science in honors accounting from Penn State
17 University, and I have a Master's Degree in taxation from
18 Widener University, which is in Philadelphia.

19 Q. And what did you do after you went to school?

14:10:36 20 A. Well, my senior year in college I interned in a
21 public accounting firm so upon graduation I joined that
22 firm and I worked with a public accounting firm for about
23 four years and learned the trade of auditing and
24 accounting. And during that time, I got my certification
14:10:51 25 as a Certified Public Accountant while at that firm.

1 I then left that firm and joined a client
2 at the time to work my way as a financial officer in the
3 business. The name of the company was EJ Lavino and
4 Company. That business was a very complex, closely-held
14:11:14 5 business, closely held being much the same type of
6 ownership like the company involved here, Hodel; not
7 public, but private.

8 And my role was to manage the financial
9 affairs of all the businesses -- there were 42
14:11:27 10 subsidiaries in that company -- primarily in the areas of
11 real estate and energy. And I started as the assistant
12 controller and I worked my way up to the controller for
13 those businesses and also the assistant treasurer for
14 those businesses, managing the cash management of those
14:11:44 15 businesses, the taxes.

16 I was also involved in the end part of my
17 time there with acquisitions of businesses for them and
18 the sales of businesses that we were involved with and
19 decided to vest.

14:11:56 20 I stayed with that company until such time
21 I decided to go back into consulting, and at that point,
22 I joined a midsize accounting firm, Grant Thornton. It
23 was a national accounting firm, really to join them as
24 a -- begin their practice in forensic accounting in
14:12:13 25 Philadelphia.

1 And soon after that, I was approached by a
2 competitor, Coopers & Lybrand, which was a much larger,
3 much more sophisticated accounting and consulting firm,
4 and I was asked to join that firm and I did so and came
14:12:31 5 in to help them build their forensic accounting and
6 consulting practice within the firm, which I did for the
7 next 28 years.

8 Q. Thank you, sir.

9 And before we move on to discuss your work
14:12:41 10 at Pricewaterhouse, you mentioned a couple of terms that
11 I'd like to ask you about and make sure that we're all on
12 the same page as to what you meant.

13 A. Sure.

14 Q. This is a basic question, but you mentioned that
14:12:50 15 you're a CPA. Can you tell the jury what that means?

16 A. Sure.

17 CPA, Certified Public Accountant, is a
18 license that's granted to those who have the requisite
19 schooling and are able to pass a pretty rigorous uniform
14:13:06 20 exam that's given to all applicants across the United
21 States.

22 I believe now the exam's given much more
23 regularly. Back when I took it back in the day, in the
24 seventies, it was twice a year that you were given the
14:13:17 25 opportunity to take that exam.

1 And once you completed and passed that exam
2 and you had the requisite time of experience at that time
3 and the right kind of schooling, which was sufficient
4 accounting credits and business credits, then you were
14:13:30 5 granted a license from, for me, it's in the State of
6 Pennsylvania, Commonwealth of Pennsylvania. I have a
7 license to practice as a Certified Public Accountant.

8 Q. And, sir, are you a member of any professional
9 associations?

14:13:40 10 A. Upon obtaining my CPA, I then was able to join the
11 American Institute of Certified Public Accountants, which
12 is the governing board for CPAs across the company. It's
13 kind of a business trade group for accountants and also
14 provides a lot of guidance on various work that
14:14:00 15 accountants do.

16 And I also joined the Pennsylvania
17 Institute of Certified Public Accountants as well.

18 Q. Thank you, sir. And you mentioned that after your
19 schooling, you worked in the industry and that you served
14:14:12 20 in various roles, including I think what you mentioned
21 was a comptroller?

22 A. Controller, yes.

23 Q. Can you tell the jury what it means to be a
24 controller, what you do?

14:14:21 25 A. Well, from the financial standpoint at least what I

1 did, it was a chief cook and bottle washer as everything
2 financial in the business.

3 Kind of the buck stopped with me, and I
4 answered to the CEO and the treasurer in the business,
14:14:34 5 both really to manage all the financial affairs of all
6 the subsidiary companies that were under the control of
7 EJ Lavino and Company. So that was managing all the
8 accounting that had to be done on a daily and monthly and
9 annual basis, managing the outside auditors, handling and
14:14:51 10 making sure all the taxes were filed, both payroll and
11 income taxes, managing the cash planning of the business,
12 which was a pretty significant part of my role because
13 they were very diverse businesses and had a lot of
14 demands on cash for investment so that was one of the
14:15:09 15 roles.

16 And also a large part of my work was
17 forecasting financial results, so understanding the
18 business operations. Large part of what we did was in
19 the energy business so there was a lot of analysis around
14:15:22 20 operations, employees labor, very labor intensive
21 business. And so we would analyze those things,
22 understand those well enough so that you could forecast
23 into the future for management to better understand the
24 results that might come from those businesses and most
14:15:36 25 importantly, the cash flows that would come from those

1 businesses.

2 Q. Sir, this might be a silly question, but in your
3 role as a controller, did you have to analyze companies'
4 financial documents to determine the financial health,
14:15:50 5 the profits and losses that the company was making?

6 A. Absolutely. That was part and parcel of what I did
7 on a daily basis. One was setting up the systems that
8 would record the financial information, understanding the
9 financial documents that were important to manage that
14:16:04 10 business, and then making sure that got recorded. And
11 then appropriately reported at different periods, whether
12 it be monthly, annually, those types of things.

13 But you did manage all the financial
14 documents and records and transactions of the business.
14:16:18 15 That was your charge.

16 Q. And, sir, you're able to look at financial
17 statements and make determinations as to whether a
18 company is making or losing money and is in general good
19 or bad financial health?

14:16:29 20 A. Yeah, well not only as a controller but I've done
21 that for the next 28 years in consulting. Most of my
22 work has been in forensics, forensic accounting, which is
23 looking at results for businesses and understanding why
24 they succeed, why they fail, what they need to do to
14:16:42 25 better their business, so forth.

1 Q. Thank you. And that's a nice segue into your work
2 at PricewaterhouseCoopers.

3 Can you just tell the jury in case they
4 don't know what is PricewaterhouseCoopers?

14:16:54 5 A. PricewaterhouseCoopers is a large international
6 accounting and consulting firm. We had -- they had -- I
7 keep calling them "we" after 28 years, but they have, I
8 believe, still around 92 offices in the United States,
9 150-some offices around the world, and they provide three
14:17:13 10 areas of service for their clients.

11 One would be the work that you would most
12 likely consider with an accountant, a public accountant,
13 would be auditing books and records for public companies
14 and private companies for the issuance of their financial
14:17:26 15 statements and reliance on by the capital markets within
16 the United States and abroad.

17 Second area would be, another area would
18 probably think about is the wonderful world of taxes.
19 And so CPAs within -- and lawyers that work within
14:17:40 20 PricewaterhouseCoopers provide tax advice, prepare tax
21 returns for both individuals and companies in the United
22 States and around the world.

23 And the last part of the practice is the
24 practice that I was involved with, which was the advisory
14:17:53 25 practice, which is a large, sophisticated, diverse

1 consulting practice that provided consulting advice to
2 companies and individuals in a number of different ways
3 based on various industries, based on various functional
4 practices.

14:18:08 5 The area that I was involved with was
6 forensic accounting so that was the area of consulting
7 that I led and managed staff and worked with clients, but
8 there could be IT consulting, there can be performance
9 consulting, there's healthcare consulting, a very number
14:18:24 10 of -- quite a number of areas of consulting are within
11 that practice.

12 Q. Thank you.

13 You mentioned again one of the areas of
14 consulting is IT consulting?

14:18:32 15 A. Yes.

16 Q. That Pricewaterhouse does?

17 A. Yes, they do.

18 Q. At a very general level, can you tell us what that
19 practice is like?

14:18:39 20 A. Well, that primary focus of that practice is to
21 help our clients, usually for the most part, large
22 sophisticated and small to mid size companies, help them
23 with the issues of IT, to actually help them better
24 implement or better operate and better understand the
14:18:59 25 environments in which they use Information Technology to

1 manage their businesses.

2 Q. And, sir, as part of that practice, does
3 Pricewaterhouse deal with clients who are using SAP
4 software?

14:19:10 5 A. Oh, yes.

6 Yeah. Huge installed base, a number of
7 companies, both around the U.S. and around the world that
8 utilize SAP software to run their businesses as well as
9 other types of software.

14:19:23 10 Q. So SAP but not just SAP, right?

11 A. No. No. No. They work with SAP, Oracle, Sales
12 Success, every number of -- especially nowadays with all
13 the new what they call cloud-based software programs,
14 they work with all the various types of software that
15 companies may need to run their business.

16 Q. So does Pricewaterhouse receive any money directly
17 from SAP in connection with that practice?

18 A. In connection with IT consulting?

19 Q. Yes.

14:19:51 20 A. No. No. No. They don't. They don't. They
21 receive money from their clients for the work they do
22 concerning that -- those software implementations, but
23 they don't receive money from SAP for any kind of IT
24 sales or work from SAP, no.

14:20:06 25 Q. Sir, you mentioned a couple of times the term

1 forensic accounting.

2 And I think you mentioned that that's
3 something that you focused a lot of your time at
4 PricewaterhouseCoopers on.

14:20:16 5 A. Yes.

6 Q. Before we get into what exactly it is you did, can
7 you just again tell the jury what do you mean when you
8 use the word forensic accounting?

9 A. Sure. It -- I guess the best way to explain it
14:20:29 10 would be thinking about kind of the CSI shows we all love
11 to watch. I'm a bit of a fan, especially of the one in
12 Las Vegas. But forensic accountants are a bit different
13 than -- trained differently than regular accountants.
14 Regular accountants spend their time on current, normally
14:20:45 15 current financial information, reporting of financial
16 information, taxes, those types of things.

17 What forensic accountants do is take that
18 same knowledge but basically apply it in a different way.
19 Apply it in the area of understanding what things have
14:20:59 20 happened to a business and why businesses have failed,
21 why they've succeeded, how in my case for the work I've
22 done over the years, why businesses, have they been
23 damaged and how do you measure the damages of a business
24 because of some action or inaction by a party.

14:21:15 25 You also get involved as a forensic

1 accountant very much in investigations, financial
2 investigations, finding the bad guys for thefts. This
3 day and age also forensics get involved with what you
4 hear, read in the papers these days about hacks that are
14:21:30 5 going on in companies on their IT systems, forensic
6 accountants get involved in that because there are
7 financial ramifications to those situations.

8 So it's people that have been trained in
9 kind of the investigative side, the understanding of
14:21:42 10 financial information to be used for a purpose different
11 than just financial reporting and doing taxes.

12 Q. So forensic accounting, is it fair to say, they
13 look backwards at the financial records and try to
14 understand what was going on backwards in time?

14:21:54 15 A. Yes, for the most part, it is a historic look at
16 financial information and understanding it in context,
17 but also there are times that forensic accountants do
18 look at projected financial information and make
19 projections or estimations of what might happen in the
14:22:08 20 future as well.

21 Q. So, sir, why don't you tell us what happened when
22 you got to PricewaterhouseCoopers. What did you do?

23 A. At the time I joined, if I may use PWC as an
24 acronym, they were just starting to build a forensics
14:22:25 25 accounting practice. I was one of the first senior

1 people that came into the practice and what I spent the
2 next 28 years is really building that practice by one,
3 learning the trade as much as I could; teaching and being
4 an educator in that area, developing, hiring and
14:22:41 5 developing staff that could perform that work around the
6 United States, and helped to develop the practice overall
7 with my partners.

8 So I spent the time building that practice
9 over the years from the day I joined the firm.

14:22:53 10 Q. In addition to your forensic accounting work, did
11 you ever do any management work for the firm?

12 A. Yes. I had spent in probably the last seven years
13 of my time at the firm, maybe ten years I'd say it
14 started, I was asked to take the lead, be the lead
14:23:09 15 partner on some various client relationships we had,
16 large companies that required appropriate attention in
17 all services that the firm did for them, so I was asked
18 to lead those client engagements, three of them in
19 particular in the Philadelphia region, along with my
14:23:28 20 duties as managing the practice and in running a
21 forensics practice as well.

22 Q. Sir, were any of those engagements that you just
23 mentioned, were any of those businesses, businesses like
24 Hodell?

14:23:39 25 A. Yes. Actually in industry or type of business, one

1 of the largest clients I worked on for over ten years was
2 a -- one of the largest wholesale drug distributors in
3 the United States, and I spent ten years working with
4 that client.

14:23:57 5 Q. Did you ever work with ERP software while at
6 Pricewaterhouse?

7 A. Yes. My clients took on those efforts, and I was
8 involved with mobilizing appropriate consulting staff to
9 help those clients as best we could to make sure that
14:24:13 10 they planned appropriately and then installed and
11 executed those systems, and they got the benefits out of
12 those systems.

13 And I also did some work, the last large
14 project I did for the firm before retiring in June of
14:24:27 15 2014, was to help PWC United States plan and develop a
16 new human resource management system which involved
17 software identification and selection and also the whole
18 development and planning around a new business process
19 within the firm.

14:24:49 20 Q. Sir, in your career have you ever done any
21 teaching?

22 A. Yes. I was a guest lecturer in forensic accounting
23 at Penn State University, both their undergraduate and
24 graduate programs for nine years, and I was a guest
14:25:01 25 lecturer at the Haub School of Business in -- at St.

1 Joe's University in Pennsylvania for three years.

2 Q. What kind of courses did you teach at Penn State?

3 A. They were forensic accounting courses that I helped
4 develop with one of the faculty, and we started giving
14:25:17 5 that course, well, it will be ten years ago now, to help
6 their students get prepared to enter the field both in
7 public accounting and private accounting, to be -- have
8 the mindset of a forensic accountant.

9 Q. How about within Pricewaterhouse, did you do any
14:25:30 10 education work within that firm?

11 A. One of my roles in building the practice was really
12 develop some core curriculum for what we did, how to
13 train our people.

14 People we hired were accountants out of
14:25:43 15 college, didn't really know how to do forensic
16 accounting, and really developed that curriculum to teach
17 them how to do that work so they would be better prepared
18 before they went out in the field and worked on clients.
19 So I did that work and taught that work.

14:25:55 20 Q. And, sir, you mentioned you retired from
21 Pricewaterhouse?

22 A. I did in June of 2014.

23 Q. What have you done since then?

24 A. Enjoyed retirement.

14:26:05 25 Q. Sir, when were you engaged to work on this matter?

1 A. It was the summer, I believe, July, 2012.

2 Q. And you were engaged by SAP's counsel?

3 A. Yes.

4 Q. And you were paid for your work?

14:26:21 5 A. At the time while I was working with PWC, PWC was
6 paid by -- for their work, and since I've been retired,
7 I've been paid directly for the work I've done as an
8 individual.

9 Q. And what is your hourly rate?

14:26:34 10 A. It is \$400 an hour.

11 Q. Is your compensation now or at any point in the
12 past in any way tied to the specific opinions that you
13 give in this matter?

14 A. Absolutely not.

14:26:45 15 Q. Do you have a stake in how this matter turns out?

16 A. Absolutely not.

17 Q. Is the fact that you were paid for your time and
18 your work, has that influenced you in any way, the
19 veracity of the information that you have provided and
14:26:59 20 that you will provide?

21 A. No, sir.

22 Q. Sir, what did you do when you first
23 received -- when you were first retained by SAP to work
24 on this matter?

14:27:06 25 A. Well, like any other matters I'd worked on over the

1 years, I really want to kind of understand what the story
2 is, and really to ask for, the primary first stop is to
3 talk to counsel, understand what the case is about, who's
4 suing who and why, and then ask for documents I think
14:27:24 5 would give me some background, which usually start with
6 the legal pleadings in the case, the complaint and some
7 of the answers.

8 And then ask, once I get my bearings as to
9 what I think the case is about, then I'll start to ask
14:27:35 10 for additional documents that I think would be useful to
11 me in the analysis to better understand the case from
12 both sides, really kind of seek out those documents that
13 have been produced by the parties. And then start to read
14 and study those documents.

14:27:48 15 Then I'll have my staff and I will go out
16 and start to research the various aspects of the case
17 that's important to us.

18 In this matter, it would be understanding
19 the industry in which Hodell operates, understand the
14:28:02 20 time frame in which this case is involved with, the 2002
21 through 2010, understand what was going on in the economy
22 and understand what their competition is about so we'll
23 do research about those things as well to get a full
24 rounded understanding of the matter and of the
14:28:20 25 circumstances in which this case came about.

1 Q. Sir, did you provide a deposition in this matter?

2 A. I did, last August.

3 Q. And what have you done since your deposition?

4 A. Well, since my deposition, I was provided some new
14:28:36 5 information on new damage claims, and requested, I
6 requested more information that might be supporting those
7 claims.

8 I read some of the trial testimony of
9 what's gone on here this last couple weeks. And I've
14:28:54 10 read, as I say, read other documents that I've asked for
11 and have been provided to me.

12 Q. Sir, have you ever done expert work before?

13 A. Yes, I have.

14 Q. And roughly, how -- can you quantify that for us?

14:29:07 15 A. I can estimate over the last 28 years I've
16 testified in federal, state, U.S. Bankruptcy Court, and
17 in arbitrations both in the U.S. and internationally over
18 60 times.

19 Q. And when you say you testified in these cases, you
14:29:23 20 mean as a certified expert, correct?

21 A. Yes. I was proffered as experts in all those cases
22 but I can recall one that I came in and testified as a
23 fact witness.

24 Q. Okay. So with respect to I guess that would make
14:29:35 25 it 59 or so cases --

1 A. Expert witness cases, yes.

2 Q. Okay. And you were qualified as a damages witness
3 in those cases?

4 A. For most of those cases those were damages, yes. .

14:29:46 5 There were some cases where I was brought in to talk
6 about financial results, failures of businesses, to
7 basically give testimony about why businesses fail.

8 But the majority of the cases I've been
9 involved and have testified and/or worked on have
14:30:01 10 involved damages.

11 Q. And you mentioned 60 or so of them. Those are just
12 ones that went to trial or some sort of hearing?

13 A. Yes.

14 Q. Were there others that didn't go to trial or
14:30:09 15 hearing?

16 A. There were hundreds more that I worked on over the
17 years, yeah. Lucky or not, most of the cases that I've
18 worked on have not gone to trial, but the ones that I
19 did, I mentioned I testified to.

14:30:22 20 Q. Sir, have you worked exclusively for defendants or
21 exclusively for plaintiffs in your career?

22 A. No, sir. I've worked for both.

23 Q. A pretty even mix?

24 A. Best I can recall, yeah. I've worked on -- some of
14:30:34 25 the most memorable things I've worked on were for

1 Plaintiffs, and I've had some great experience working on
2 some cases for defendants. So it's been both sides.

3 Q. Do you have a methodology that you typically apply
4 when conducting a damages analysis as an expert?

14:30:46 5 A. Yes, I do.

6 Q. And does that methodology change whether you have
7 been retained for the Plaintiff or for the Defendant?

8 A. No, it's going to be the same approach, same
9 mindset, and the same skepticism and investigation that
14:30:59 10 I'll do on either side.

11 Q. And can you tell the jury basically what that
12 methodology is?

13 A. Certainly. It is, as I mentioned earlier, it's in
14 this case and other cases is to really try to understand
14:31:12 15 the entire case, not just one side of the story because
16 it's very easy to get kind of focused on one side when
17 you're engaged by one side, just to listen to their story
18 and then just kind of run down that road.

19 But that's not the way I or people that I
14:31:25 20 have taught and worked with over the years. The idea is
21 to really look as broadly as you can at the information
22 and try to get both sides of the story, and then seek out
23 as much information you can, that you believe to be
24 relevant and credible, to better understand and to prove
14:31:40 25 or disprove a theory that you have about the case or

1 about the damages.

2 Q. And, sir, in the course of that methodology, you
3 mentioned -- well, strike that.

4 Do you rely on -- you make assessments on
14:31:55 5 documents that would be used and that you would rely on
6 in the ordinary course of your experience as a
7 professional accountant?

8 A. Yes. There are documents that have much more
9 credibility and importance to your analysis. You want to
14:32:07 10 kind of look for those types of documents and understand
11 those the most. And then there will be other documents
12 that may not be as credible but may provide some
13 background but not necessarily something you are
14 necessarily going to rely on as firmly as some of those
14:32:21 15 other documents.

16 Q. And did you look at Hodell's financial statements
17 that were provided in this case?

18 A. Yes.

19 I looked at all the financial information
14:32:30 20 that was provided in this case for Hodell, I believe,
21 starting in 2002 through 2010.

22 Q. And, sir, have you formed some expert opinions in
23 this matter as they relate to the damages that may or may
24 not have been suffered by Hodell?

14:32:45 25 A. Yes, I have.

1 Q. And have you come to those opinions within a
2 reasonable degree of professional certainty?

3 A. Yes, I have.

4 MR. KELLEHER: Your Honor, at this time SAP
14:32:54 5 would like to proffer Mr. Osborne as an expert in
6 damages, as an expert in accounting, and as an expert in
7 forensic accounting.

8 THE COURT: You may proceed.

9 MR. KELLEHER: Judge, I have a binder for
14:33:10 10 the witness. May I approach?

11 THE COURT: Sure.

12 BY MR. KELLEHER:

13 Q. And, sir, before we begin, you haven't been in the
14 audience, for lack of a better word, for this trial, is
14:33:54 15 that correct?

16 A. I have not. This is the first time in the
17 courtroom.

18 Q. Well, have you been provided with the trial
19 transcripts of certain witnesses, though?

14:34:04 20 A. I have been.

21 Q. And which witnesses have you been provided with?

22 A. Otto Reidl, Kevin Reidl, Jaime --

23 Q. Jaime Clarke?

24 A. Clarke, Jaime Clarke.

14:34:17 25 Mr. Killingsworth. Those are the ones that

1 come to mind immediately.

2 Q. And you reviewed -- you asked for those documents
3 and we provided them to you?

4 A. Yes, I asked for them because I believe -- I
14:34:28 5 thought that they would be pertinent and relevant to my
6 testimony if -- when I came to provide testimony.

7 Q. Thank you, sir. So let's start, I guess, at the
8 beginning.

9 In a case like this one, what sorts of
14:34:42 10 damages would you look for first?

11 A. Well, in most damages, commercial damages involving
12 businesses, what is usually claimed and you usually look
13 for, business is usually affected in the amount of sales,
14 sales being the most important thing in the business
14:35:03 15 because without having sales, there's no reason to have
16 the business around. You need the revenue to come in.

17 So we're usually looking first and asking
18 questions about, okay, how was the customer base
19 affected, what sales might have been lost or not received
14:35:15 20 because of some action or inaction. And so I'll look at
21 those areas around sales to determine whether there are
22 what we term lost sales.

23 And from that, you would then go around to
24 determine what lost profits would have been from -- the
14:35:29 25 profits lost from those lost sales.

1 Q. And among other things, you've read the trial
2 testimony of Mr. Otto Reidl, Mr. Kevin Reidl, and
3 Mr. Jaime Clarke on this topic you're talking about, the
4 lost sales, right?

14:35:41 5 A. I did, yes.

6 Q. And I think you mentioned some of the ways but can
7 you just tell us how does an accountant such as yourself
8 go about assessing whether there are, in fact, lost
9 profits from lost sales in a given case?

14:35:52 10 A. Well, most important to you, once you get past the
11 story is to look for the documents. That is, you're
12 going to look for information that gives you insight as
13 to whether sales, for example, canceled orders, I know
14 there's been some discussion here that there were orders
14:36:07 15 canceled. Well, there are documents within a company
16 that would be able to show you what orders were canceled.

17 Obviously, if it's a canceled order, the
18 order was entered and sometime afterwards, for some
19 reason, that order was then reversed or canceled, you
14:36:23 20 should be able to find that information in a company's
21 financial records to show those canceled orders.

22 I would look at, usually we'll try to focus
23 on the largest customers within a company and try to then
24 analyze those large customers to see whether there's been
14:36:40 25 large declines in the sales volume with those large

1 customers.

2 Most companies, you know, operate with kind
3 of a stable of very, very large customers that might make
4 up a large part of their business so usually it's kind of
14:36:52 5 an 80/20 rule. Some businesses you'll have 80% of your
6 sales come from 20% of your -- 20 of your top customers.

7 So we would start to look at the actual
8 sales history of those top customers to see whether you
9 see a decline in those sales over some period of time.

14:37:07 10 You're going to look for correspondence
11 from those customers where they will be showing you that
12 they're canceling or they're not ordering, that they are
13 done with the relationship, things like -- those are the
14 kinds of documents I have seen in the past that would be
14:37:22 15 able to support information related to lost sales in a
16 situation.

17 Also, you would also look at the
18 competition, understand if they're not -- sales are not
19 being made to one company, well, are there other
14:37:33 20 companies to buy those products from if they don't buy
21 them from the company you're looking at?

22 Q. Sir, is it possible to conduct interviews and
23 things of that nature to assist in the analysis you're
24 describing?

14:37:42 25 A. Absolutely. I, in the past, one of the steps we

1 took was to actually go out and survey independently some
2 of the companies to see whether they, in fact, would tell
3 us whether they have reduced their sales or ceased buying
4 from a company and try to get reasons from them, so we've
14:38:01 5 done surveying of customers as well.

6 Q. Thank you, sir.

7 So that analysis that you just described in
8 your responses to my last several questions, did you
9 apply that analysis to the facts of this case?

14:38:13 10 A. Yes, I did.

11 Q. And have you come to an opinion as to whether or
12 not there were lost sales or lost customers or canceled
13 orders?

14 A. Yes, I have come to an opinion.

14:38:24 15 Q. And, sir, what is that opinion?

16 A. There is no, in the record, there is no evidence
17 that I saw that can detail or to quantify any lost sales
18 due to any -- for any reason related to the usage of the
19 Business One software.

14:38:44 20 I didn't see any evidence in the testimony
21 that I found to be credible, along with actual documents.
22 It's one thing to say something. It's another thing to
23 show it. And I'm pretty much a stickler on looking at
24 the actual documents that would support a statement, and
14:39:00 25 I didn't see any.

1 Q. Sir, you mentioned being a stickler for documents.

2 Is that the ordinary practice of

3 accountants and forensic accountants in the field?

4 A. Yeah, I guess we're a little bit nerdy in that way,

14:39:11 5 yeah. But it's kind of, those of us at the right age

6 might understand the Joe Friday from Dragnet. You know,

7 "It's just the facts, ma'am. Just the facts." We want

8 to know the facts. You can say something, but I want to

9 see the documents that show me the reality and the real

14:39:28 10 business documents that tell me the story, not just

11 the -- just not the statement.

12 Q. Sir, are you aware of when Hodell filed this

13 lawsuit?

14 A. I believe in 2008.

14:39:38 15 Q. If I told you it was November, 2008, would that

16 sound right?

17 A. Sounds about right. It was the end of 2008.

18 Q. Does Hodell have, like, a financial department in

19 your view or controller or anything like that?

14:39:49 20 A. Well, I understand they have a controller, and I

21 would assume a business of their size and sophistication

22 has a requisite and appropriate finance department and

23 accounting department to run that business.

24 Q. And you actually worked for closely-held companies

14:40:04 25 like Hodell, right, in your past?

1 A. Yes, I did.

2 Q. And did Hodell have an opportunity to gather the
3 information, the documents, the proof that you just
4 talked about?

14:40:14 5 A. Yeah. That's kind of been the surprising thing to
6 me.

7 I mean, when the suit was filed, they were
8 still operating Business One software and so whatever
9 problems and concerns they had, they were alert to them
14:40:27 10 at that time frame and they could have actually gone in
11 to try to find records that would support a claim of lost
12 sales, of canceled orders, of reductions in sales volume
13 by customers, but I saw none of that documentation.

14 Q. Sir, let's switch gears.

14:40:47 15 You understand that Hodell is claiming that
16 it had to pay increased interest due to Business One.

17 Do you understand that?

18 A. I understand there's a claim for that, yes.

19 Q. And among other things, you've read the trial
14:41:01 20 testimony of Mr. Otto Reidl on this topic, right?

21 A. I have.

22 Q. How does an accountant, such as yourself, go about
23 assessing whether a company like Hodell suffered from
24 increased interest penalties as a result of slow
14:41:18 25 software?

1 A. Well, the first thing you'd look for is having
2 dealt with banks myself for quite a number of years in
3 the business environment, there's going to be -- there
4 should be correspondence from a bank. There's always a
5 lot of conversation between a bank and its customer about
6 its terms and conditions, about its reporting, about its
7 performance.

8 Banks watch their customers very closely
9 and they want to understand what's going on. There's a
10 lot of correspondence that goes to that.

11 I would expect in this situation that I
12 would have been able to review documents which
13 specifically showed concerns by the bank about
14 performance related to software or poor performance in
15 general, and then actual documents which displayed their
16 change in the terms and conditions that would lead to
17 some increase in interest or some penalties related to
18 the interest that they were being charged.

19 That would be my expectation.

20 I would see bills from the bank, because
21 Hodell would have to pay those interest charges. They
22 have interest charges that show up on their profit and
23 loss statements so I would like to see those statements
24 and I would most importantly want to see an analysis that
25 shows me the change in interest environment, the change

1 in interest charges that would actually calculate what
2 the alleged damages related to interest would be.

3 Q. So, sir, I heard you say that you'd look for three
4 things.

14:42:41 5 You'd first look to see whether there was
6 any documentation from the bank or the lending
7 institution to identify whether there were even increased
8 interest at all?

9 A. That's correct.

14:42:50 10 Q. The second thing you'd look for, to see whether
11 there was any documentation that that assumed increased
12 interest was attributable to software as opposed to
13 attributable to some other factor, right?

14 A. Right. Other factors could be the lending
14:43:05 15 environment which was going on, which is very important
16 in this matter, the time frame this was happening, yes.

17 Q. And then the third thing I heard you say was that
18 you'd want to see what the actual calculation was, like
19 how they got to the number of -- the amount of lost
14:43:20 20 interest that was claimed, is that basically what you
21 said?

22 A. The excess interest, yes, I would want to see that
23 calculation.

24 Q. So those three pieces of methodology, did you apply
14:43:30 25 that methodology in this case with respect to Hodell?

1 A. Yes, those are the things I was looking for when I
2 learned of this claim.

3 Q. And what did you find?

4 A. I didn't find any of it. I just heard the
14:43:39 5 assertion by Otto Reidl concerning this increased
6 interest charge, but I hadn't seen any documents that, as
7 I just described, that would support that claim.

8 Q. Sir, you mentioned Mr. Reidl's testimony.

9 I'd like you to take a look at Exhibit 247.
14:43:56 10 Can we get that up on the screen? I think we're on the
11 second page, Mr. Adelman. There we go.

12 Do you see it's in your binder, it's also
13 on your screen?

14 A. I have it here, yes.

14:44:17 15 Q. So you're with me?

16 A. Yes, I am.

17 Q. Sir, do you recall reading Mr. Reidl's testimony
18 about this document?

19 A. Yes.

14:44:24 20 Q. And is this the sort of document that a
21 professional accountant like yourself would rely upon in
22 calculating lost interest?

23 A. No, it would not be.

24 Q. Why not?

14:44:36 25 A. Well, this is an e-mail. Looks like it's sent in

1 the heat of battle. It's -- it's a bit of a kind of a
2 threat, and it alleges that the bank is increasing cost
3 of interest due to their poor performance and it cites
4 some -- one number in it really, but in the context, it
14:45:02 5 doesn't provide any support from an independent party
6 like the bank, what does the bank say, how did the bank
7 analyze this. None of that is in this e-mail.

8 It's just an e-mail from Mr. Reidl kind of
9 threatening somebody because he's concerned about his
14:45:17 10 performance and he's kind of rattling the saber a bit,
11 trying to get people to perform better than what they
12 were doing.

13 Q. So as a professional, as a professional accountant,
14 you wouldn't rely on an e-mail from a party like this?

14:45:30 15 A. No, I wouldn't.

16 And the e-mail itself really doesn't
17 provide any kind of details on which you could ascertain
18 an increased interest charge that was actually charged
19 and actually paid.

14:45:43 20 Q. I'd like to shift gears a little bit.

21 You can take that one down, Bob.

22 You understand that Hodell is claiming as
23 part of its damages calculation something that they call
24 lost training costs.

14:45:57 25 Are you aware of that?

1 A. I am.

2 Q. And among other things, you've read the trial
3 testimony of Mr. Otto Reidl on this topic, is that right?

4 A. I did.

14:46:06 5 Q. How does an accountant such as yourself go about
6 assessing lost training costs?

7 A. Increased training costs I might add is what I
8 think he's claiming for, increased training costs.

9 Q. Yes, thank you.

14:46:20 10 A. Part of the alleged problems with the software.

11 Well, I mean, it's actually a relatively
12 obvious procedure and one is you're going to ask for
13 details of those costs. Most importantly, who, who is
14 doing the training, what was their role or job
15 responsibility so you can make sure that that job
16 responsibility aligned itself with the software; it
17 wasn't just somebody going to be trained on human
18 resource issues. You want to make sure it's the right
19 topic.

14:46:49 20 You want to understand the role, the job
21 responsibility of the people that are getting the
22 training, and then easily, you want to get the records
23 that underlie the actual payments for the training,
24 whether it's invoices, stamped invoices to show that
14:47:04 25 these were paid, you would look for copies of canceled

1 checks, invoices from the parties that did the training,
2 travel documents such as plane tickets, rail tickets, car
3 expenses, things like that, those are the normal things
4 you would look for.

14:47:19 5 Q. So, sir, just so we're clear, when you talk about
6 you'd look for documentation, are you talking about the
7 obvious things such as like the actual names of the
8 actual people who were trained?

9 A. Yeah. You want to know who they are because you
14:47:31 10 want to make sure it's not training for some other reason
11 other than the software implementation.

12 Q. And if they took a plane to get somewhere, you'd
13 want to know like how much that cost?

14 A. Yeah, you'd look for an expense report. Companies
14:47:45 15 like Hodell would have expense reports filed by their
16 employees and attached to those expense reports would be
17 details of the travel expenses, the plane tickets, and
18 the parking tickets, and everything else like that.
19 Those would be in those files.

14:47:55 20 Q. Sir, did you apply that analysis that you just
21 discussed to the facts of this case?

22 A. Yes, I did.

23 Q. And what did you find?

24 A. I didn't find any of that documentation.

14:48:06 25 The only documentation is -- that I heard

1 discussed was what Otto Reidl said in his testimony. I
2 didn't see any, any documentation detailing the
3 calculation of increased training costs.

14:48:21 4 Q. And when you say that you saw the documentation of
5 Mr. Reidl's testimony, you mean you actually read what he
6 said, right?

7 A. Yeah, I saw his transcript and I read it, right.

8 Q. Sir, in your professional accounting opinion, what
9 are Hodell's losses with respect to training costs?

14:48:32 10 A. There's no evidence at all of any increased
11 training costs that I saw.

12 Q. Thank you, sir. And I actually forgot to ask you
13 that question with respect to interest.

14 Sir, you remember the interest that we just
14:48:43 15 discussed about five minutes ago?

16 A. Right.

17 Q. In your professional accounting opinion, what are
18 Hodell's losses with respect to interest?

19 A. I saw no evidence of increased interest cost as it
14:48:55 20 relates to the operation of the Business One or the ERP
21 system.

22 I didn't see anything.

23 Q. And the same is true for alleged lost sales or lost
24 customers or lost orders?

14:49:03 25 A. No documentation, no evidence whatsoever that I saw

1 would support a claim for that.

2 Q. And so your quantification of that claim would be
3 zero?

4 A. It would be a zero.

14:49:14 5 Q. Sir, let's shift gears again.

6 You understand that Hodell is claiming that
7 it incurred out-of-pocket costs as a result of Business
8 One, right?

9 A. I am aware of that.

14:49:23 10 Q. And among other things, you've read the trial
11 testimony of Messrs. Kevin and Otto Reidl on this topic?

12 A. I have.

13 Q. Sir, how does an accountant such as yourself go
14 about determining the out-of-pocket costs that a business
15 like Hodell may have incurred?

16 A. Well, you would go seek out, in some way, assemble
17 what those costs were. It would probably be starting
18 with files would have invoices from a vendor which were
19 related. In this case, those would be files related to
14:50:01 20 LSi/IBIS for costs related to the ERP installation.

21 And you would then detail those costs, list
22 them out on a sheet, and get them listed out and
23 understand what they are. And then you would request
24 documents that would support those costs. They would be
14:50:19 25 canceled invoices from third parties. It would be

1 canceled checks, those types of things to make sure that
2 you understood that not only were those amounts billed or
3 considered to be part of the implementation costs, but
4 they were in fact paid by Hodell. You would want to make
14:50:34 5 sure, confirm that they were paid.

6 Q. Sir, I'd like you to take a look at Exhibit 622.
7 It's in your binder behind Tab Number 3.

8 A. Okay.

9 Q. Do you recall reading Mr. Reidl's testimony about
14:50:48 10 this document?

11 A. Yes, I do.

12 Q. And do you have an understanding of what this
13 document purports to be?

14 A. I do.

14:50:54 15 Q. And can you tell the jury what this document
16 purports to be?

17 A. As I understand it, this document is -- purports to
18 list all the costs that were incurred by Hodell in the
19 implementation of the Business One ERP system.

14:51:10 20 Q. Did you do any investigation to verify that these
21 amounts may have actually been paid?

22 A. Yes. I was provided a -- all the invoices,
23 canceled invoices, canceled checks from Hodell and/or LSi
24 that support each one of these listed amounts.

14:51:32 25 Q. And, sir, based on that review of the underlying

1 documentation, the invoices and the checks you just
2 discussed, are you able to say to whom this money was
3 paid?

4 A. All this money was paid to LSi.

14:51:46 5 Q. Sir, I'd like you to just look at the document real
6 quick. There's a column there that says "SAP."

7 Do you see that?

8 A. I do.

9 Q. What does that reflect?

14:51:57 10 A. Well, I think it's -- it's mislabeled or it's
11 certainly misleading.

12 I think it was trying to purport that these
13 are amounts that were paid or relate to SAP, but in fact
14 when you look at the invoices, these are amounts, all
14:52:16 15 those amounts were paid to LSi and it was for the various
16 work that LSi did in testing the system and other types
17 of services they did while the system was getting ready
18 to run.

19 Q. So you actually looked at the invoices and the
14:52:27 20 canceled checks that support the entries on this
21 document, right?

22 A. I did, yes.

23 Q. And notwithstanding any of the column headers here,
24 you're able to testify that those amounts were paid to
14:52:39 25 LSi, not to SAP, right?

1 A. That is correct.

2 Q. Sir, do you have an understanding of whether SAP
3 would make any money off of the payments that were
4 reflected in this exhibit?

14:52:51 5 A. Well, my understanding of how the process works for
6 resellers is that LSi would then take some portion of the
7 amount it receives for the licenses that they sold to
8 Hodell, and they would pass on some of the portion of
9 those license payments to SAP, some portion of it.

14:53:11 10 Q. And based on your review of the evidence in this
11 matter, do you know how much money SAP actually made?

12 A. I understand from Mr. Killingsworth's testimony
13 that it was around \$150,000.

14 Q. Do you know how long Hodell ran Business One at
14:53:27 15 SAP, approximately?

16 A. Yeah, around 25 months it was actually running as I
17 understand it.

18 Q. Does that have any effect on the way an accountant
19 like yourself would calculate Hodell's out-of-pocket
14:53:39 20 losses?

21 A. Well, I think you need to give some consideration
22 to the useful life of the software. They actually use
23 the software for two years, so to make a demand for all
24 the costs, for all the costs of implementation is one
14:53:55 25 situation, but the actual costs that were paid to SAP,

1 the \$150,000, some portion of that shouldn't be -- I
2 don't believe should be repaid because they actually used
3 the software for two years.

4 So if it's a ten-year life of the software,
14:54:10 5 you know, you got two-tenths or one-fifth of the costs
6 should not be paid back because they actually utilized
7 the software for some period of the useful life of that
8 software.

9 Q. Sir, I'd like you to take a look at Exhibit 621 and
14:54:25 10 623. They should be in your binder behind -- behind Tab
11 4.

12 A. Okay.

13 Q. Bob, maybe you can throw them up on the screen
14 juxtaposed.

14:54:53 15 Are you with me, Mr. Osborne?

16 A. I am. I have it in front of me here.

17 Q. Do you remember seeing these documents before?

18 A. I have seen them, yes.

19 Q. Do you recall Mr. Kevin Reidl's testimony about
14:55:05 20 these documents?

21 A. I do.

22 Q. What is your understanding about what these
23 documents are?

24 A. This is to purport to show the amount that Hodell
14:55:11 25 spent in acquiring, installing the Profit 21 software

1 which replaced the Business One software.

2 Q. Are summaries like these documents we're looking
3 at, excuse me, are summaries like the documents that
4 we're looking at, are those the sorts of things that a
14:55:27 5 professional damages expert like yourself would rely upon
6 in assessing a damages claim?

7 A. Well, in and of itself, no. I mean, this is a
8 listing. As I mentioned before, you can put the listing
9 together but then you got to say, okay, let's make sure
14:55:42 10 they in fact paid those amounts and did they pay them for
11 what reason.

12 So you would ask for the canceled checks,
13 the invoices, the detail, the actual documents from the
14 company or third-party that would support each one of
14:55:54 15 these line items that are on these lists.

16 Q. And, sir, have you ever seen any of that supporting
17 documentation, the invoices or the checks, with respect
18 to the entries on this list --

19 A. No.

14:56:02 20 Q. -- in this case?

21 A. I have not seen any of them.

22 Q. Sir, even if you were to assume, and I'm asking you
23 now to assume, assume that the information in Exhibit 621
24 and 623, assume that it was supported by invoices, okay?

14:56:18 25 A. Okay.

1 Q. In that case, in that hypothetical case, would you
2 be able to find or would you find that Hodell suffered
3 any damages as a result of Profit 21 purchases?

4 MR. LAMBERT: Objection.

14:56:32 5 THE COURT: Overruled.

6 A. Can you state that question again? I'm sorry.

7 Q. Absolutely. So I'm setting up a hypothetical.

8 A. Okay.

9 Q. We're looking at Exhibit 621 and 623, right?

14:56:42 10 A. Right. I got you.

11 Q. And these as you testified are summaries of amounts
12 that Hodell paid on account of acquiring licensing and
13 implementing the Profit 21 software.

14 A. And you want me to assume, in fact, they were, in
14:56:52 15 fact, paid and they were for the Profit 21 software?

16 Q. Exactly. I want you to assume all those things.

17 A. Yes. That's my premise, right.

18 Q. As you mentioned, there are no invoices or canceled
19 checks to support any of this, right?

14:57:05 20 A. Right, but you asked me to assume it.

21 Q. I'm just asking you to assume hypothetically that
22 there were such backup documentation.

23 A. Okay.

24 Q. And so my question to you is in that hypothetical
14:57:15 25 situation, would you be able to say whether or not Hodell

1 suffered any damages as a result?

2 A. Of these expenditures? No, not at all.

3 Q. And why is that?

4 A. Well, this is all duplication.

14:57:26 5 The premise for calculating damages is to
6 return the Plaintiff back to the position they were
7 before the harm. So if you think about that, it would be
8 to, okay, let's remove the Business One software and
9 we're going to move to a new software, they would put in
14:57:41 10 Profit 21.

11 In essence, what they've asked here is a
12 duplication of what they've already claimed. They've
13 claimed pay me back all the costs I paid for for the
14 implementation of Business One, and now pay me all the
14:57:51 15 costs to implement Profit 21.

16 It's a duplication. It's double. They're
17 doubling the claim, and it's not relevant to the
18 analysis.

19 The only, the only amounts that would be
14:58:03 20 relevant for analysis for damages would be the amounts
21 that were paid to SAP; not to anybody else.

22 Q. So this is basically double counting?

23 A. It is double counting, yes.

24 Q. Let's switch gears, sir.

14:58:14 25 Now, you understand that Hodell is claiming

1 what I believe they call a lost return on investment in
2 the Business One software?

3 A. Yes, I read about that in the testimony, yes.

14:58:29

4 Q. You mentioned the testimony. You're talking about
5 Mr. Otto Reidl's testimony?

6 A. Yes, Mr. Reidl's testimony.

7 Q. The testimony he gave here in court?

8 A. Yes.

9 Q. And you read it on the transcript?

14:58:35

10 A. I did.

11 Q. How does a professional accountant such as yourself
12 go about assessing return on investment for an ERP
13 purchase?

14:58:46

14 A. Well, it's common. As a matter of fact, it's
15 absolutely necessary and standard that a company, before
16 it goes into installing or planning to install a new
17 business software or a new business process, would do the
18 appropriate planning and estimation required to determine
19 whether that made sense financially.

14:59:05

20 We all do that. We all do that with buying
21 a car or, you know, buying a new house. Can I afford
22 that house? Let me -- on the back of the envelope or on
23 your computer you're going to make a calculation of the
24 amount of money I have coming in, the amount I want
14:59:22 25 spend, does this make sense, can I afford that?

1 Well, companies do the same thing. As a
2 matter of fact, it's a standard practice and I know from
3 my own standpoint of working with companies because I've
4 done this, I've done it for PWC as well, is you would go
14:59:34 5 through the analysis to determine what are the benefits
6 that are going to come from this new system. And not
7 just pie-in-the-sky benefits. You really have to
8 understand what are the items, how am I going to benefit,
9 am I going to get higher sales and, therefore, higher
14:59:45 10 profits? Am I going to lower the costs of my business?
11 What am I going to do?

12 I have to list those out and I have to
13 actually quantify those benefits that I'm going to get
14 from this new system. And then I basically compare that
14:59:56 15 financially to what the costs are for putting in the new
16 system.

17 Very, on it's face, a very simple exercise.
18 There's more to it when it comes to using interest
19 charges and things like that, but you make that
15:00:07 20 comparison and you make a determination on the front end,
21 does it make sense I'm going to put this system in
22 because it's going to pay itself back.

23 And that's what I understand Mr. Reidl was
24 talking about, although this was not done at Hodell, not
15:00:22 25 in reality it was never done.

1 THE COURT: Let me interrupt you, okay, so
2 we can take our break.

3 MR. KELLEHER: We can take it, Judge. I
4 have maybe three more minutes on this topic.

15:00:31 5 THE COURT: Yeah, no, I have the FBI
6 outside waiting for me.

7 They're looking to pick a few people up
8 tonight so I have to sign a couple documents and they
9 have been waiting there. So we'll take it now. I told
15:00:44 10 them to come at 3:00 o'clock and so they're there.

11 MR. KELLEHER: Very well, Your Honor.

12 THE COURT: Okay. So we'll see you in a
13 few minutes.

14 THE CLERK: All rise for the jury.

15:00:52 15 (Jury out)

16 (Recess taken)

17 (Proceedings resumed in presence of the
18 jury as follows:)

19 THE COURT: Please be seated, folks.

15:30:27 20 (Discussion had off the record).

21 BY MR. KELLEHER:

22 Q. All right. Mr. Osborne, before we left for the
23 break, we were talking about Hodell's claim for alleged
24 return on investment.

15:30:43 25 Do you recall that?

1 A. I do.

2 Q. And just to sort of reposition us back where we
3 left off, you testified -- I asked you how you'd go about
4 calculating a potential or alleged return on investment
15:30:58 5 as a professional accountant.

6 Do you remember that line of questioning?

7 A. Yes.

8 Q. And as I understand your answer, you basically said
9 that, look, before a company spends any money, they're
15:31:09 10 going to come up with a plan, is that right?

11 A. I would hope they would, yes.

12 Q. And I believe I understood your testimony to be
13 that the plan basically has two big components, and the
14 first one is, you know, will this thing, this thing we're
15:31:26 15 going to purchase, actually make us any money in the long
16 run, given all of our expenses and all the other
17 financial components that will go into buying the thing,
18 maintaining it, and then any -- any return you might see
19 from that.

15:31:40 20 Is that the first component, basically?

21 A. Yeah, it's to understand the benefits of going
22 through the exercise of taking on all the pain to make a
23 change like this, yeah.

24 Q. The cost and the benefits, right?

15:31:50 25 A. The cost and the benefits. You need both.

1 Q. And then the second piece of that plan I heard you
2 testify was, you know, what effort would need to be
3 undertaken by a company like Hodell to actually realize
4 the benefits that might hypothetically occur based upon
15:32:07 5 the purchase of that, or based upon that investment,
6 right?

7 A. That's correct. And a good example from my own
8 experiences was when I was working on the new human
9 resource management system for PWC, I mean one of the
15:32:20 10 things we had to prove to the executives of the firm was,
11 oh, yeah, we're going to do this process. It's going to
12 be, you know, a lot of work. It's going to take some
13 money to get it done.

14 What benefits are there? How can you prove
15:32:32 15 to us that these benefits will come to fruition, that
16 we'll actually earn these benefits? And we had to do a
17 study to find out, for one example was we were going to
18 give some speedier time for information about staff's
19 performance so that they may be able to reduce the amount
15:32:48 20 of time, people spend to reduce the amount of time that
21 they spend in review meetings at year end to determine,
22 you know, advancement and for compensation.

23 So we actually had to go through that
24 process to determine what are the hours that would be
15:33:01 25 saved from the meetings, from who, what would be actual

1 savings for dollars and savings for time that wouldn't be
2 spent in these meetings. You have to go through those
3 elements to determine the benefits and what the magnitude
4 and quantification of those benefits are.

15:33:16 5 Q. And by flipping the switch on an ERP system to go
6 live, that doesn't necessarily magically get you return
7 on that investment, does it?

8 A. No. No. No.

9 That would be a very dangerous road to
15:33:32 10 take. I mean, there is often a lot of, my experience has
11 been there's a lot of work to do after the switch is
12 turned, especially large, complicated, complex systems.
13 They need to be thought through as to how the benefits
14 are going to be realized, a plan for realizing those
15:33:48 15 benefits, and actually executing those plans to make sure
16 that you do what you need to do to make sure that you
17 either increase sales or reduce cost.

18 Q. In other words, once you flip the switch on the
19 go-live, the business has to actually do things to see
15:34:01 20 benefits from the software, right?

21 A. Right. And there's going to be some change that
22 would be involved with the way the people operate, the
23 procedures, their processes, and they have to make sure
24 that they follow through those to be able to reap those
15:34:13 25 benefits.

1 Q. And hypothetically, if you don't do those things,
2 then you don't see the return on the investment, right?

3 A. That can happen, yes.

4 Q. So, sir, that document that you talked about, the
15:34:26 5 plan that we've been talking about --

6 A. Right.

7 Q. -- did you see anything like that that Hodell
8 produced?

9 A. No. As a matter of fact, we looked for it, and I
15:34:37 10 read in his, I believe, his deposition, Mr. Reidl's
11 deposition, that they had done no plan like that. And
12 there was nothing available.

13 Q. And -- I'm sorry?

14 A. And there was nothing available to see.

15:34:49 15 Q. I'm saying, when you are saying Mr. Reidl, you're
16 referring to Otto or Kevin or somebody else?

17 A. Otto Reidl.

18 Q. And you said he said that that plan was never done?

19 A. There was not a plan and so, therefore, I was
15:35:00 20 unable to review such a plan that would have been done in
21 advance of launching, planning to and launching the
22 Business One ERP system.

23 Q. So if there was no plan, do you have an
24 understanding of what Mr. Reidl did do to come to his
15:35:16 25 alleged return on investment claim?

1 A. Yes. I have an understanding of what I believe he
2 did, yes.

3 Q. Could you tell the jury what you believe Mr. Reidl
4 has done?

15:35:27 5 A. Well, since there wasn't a plan done and there's no
6 evidence as to what Hodell thought would be the benefits
7 of this, this installation, what Mr. Reidl did after the
8 fact -- and this is during litigation -- is he went and
9 did a, basically a math exercise. He basically said
15:35:48 10 these are the amounts we spent, the \$843,000 that we
11 spoke about earlier and the out-of-pocket costs, he
12 basically did a math exercise to find out how long would
13 it take us to recoup or get paid back that \$843,000, and
14 over time at a certain interest rate.

15:36:06 15 And that's what the calculation does. It's
16 a hypothetical calculation. It's not real. It didn't
17 happen at the time. It doesn't involve any real
18 benefits. They are just benefits that are plugged in to
19 make them equal over time with interest what they spent.

15:36:24 20 Q. Sir, I'd like you to -- actually that analysis that
21 you just described --

22 A. Yes.

23 Q. -- the analysis, your understanding of Mr. Reidl's
24 analysis, is that sufficient or is that the sort of
15:36:35 25 analysis that a professional accountant such as yourself

1 would rely upon in the ordinary course?

2 A. No. As I described earlier, it's a much more
3 sophisticated analysis that needs to be done.

4 You really have to think about what are the
15:36:48 5 benefits and how am I going to quantify what those
6 benefits will be to the company. And you may find out or
7 Hodel might have found out that in fact the benefits
8 were going to be less than the costs and maybe they would
9 have had a different decision, but without doing that
15:37:04 10 analysis and determining what the real benefits would be
11 and calculating them and comparing them to the amounts
12 you're going to spend to actually implement the system,
13 you don't know.

14 And it, what he's done now is to basically
15:37:18 15 kind of make it up at the end of the game and say, "Okay,
16 well, I just want to get paid back my costs so let me
17 just kind of plug that in and I'll calculate what that
18 equals."

19 Q. Sir, you read Mr. Reidl's testimony from the
15:37:31 20 transcripts?

21 A. I did.

22 Q. Do you recall him discussing an Exhibit 38? I can
23 put it on the screen for you.

24 A. Yeah, if you could. I didn't realize there were
15:37:42 25 numbers.

1 Q. Could you take some time -- it's not in your
2 binder, I apologize.

3 A. Okay.

4 Q. Could you take some time to familiarize yourself
15:37:57 5 with that document? It's just this one page, I'll
6 represent to you.

7 A. Okay. Okay.

8 Q. Sir, does this document promise any specific rate
9 of return on investment of Business One?

15:38:26 10 A. No. It looks -- it appears to kind of offer a
11 little tool kit. So someone looking at, considering an
12 SAP product might be able to start to figure out what a
13 rate of return might be.

14 Q. And that tool kit's not in this one page that we're
15:38:41 15 looking at, right?

16 A. No. No. It just discusses that there's -- it's
17 the calculator is here to help you to gage the cost
18 savings, so it's some method that you might be able to go
19 through to start the process of developing that plan.

15:38:57 20 Q. I'll represent to you, sir, this is the only page
21 of this entire exhibit. Is this the sort of document
22 that a professional accountant would ever rely upon in
23 determining or calculating a return on investment?

24 A. No. There's nothing here that I would rely on.

15:39:14 25 No.

1 Q. Thank you, you can take that down, Bob.

2 So let's just go back to Mr. Reidl's return
3 on or alleged return on investment calculation.

4 Are there any other deficiencies with that
15:39:38 5 calculation in your professional opinion?

6 A. Well, again it's duplicative. It's a real problem
7 we have here.

8 The element that it uses to make the
9 calculation is the amount that they're going -- they
15:39:51 10 spent to do the implementation. The same \$843,000 we
11 spoke about earlier.

12 So in essence, what Hodell's asking for is
13 "Pay me once for the \$843,000 for my out-of-pocket costs.
14 Pay me again for the amount I spent for the other
15:40:10 15 software, the Profit 21. And now pay me again because I
16 expected to get my return of that money, the \$843,000."

17 And so it's a third time they're asking for
18 the same amount.

19 Q. So that would be triple counting?

15:40:23 20 A. That would be triple counting.

21 Q. Sir, I'd like to change gears a little bit and talk
22 about one last category of alleged damages.

23 You understand that Hodell is claiming or
24 alleging that they suffered from lost productivity due to
15:40:50 25 Business One, right?

1 A. I am aware of that.

2 Q. And you understand that Hodell is saying or is
3 claiming that this alleged lost productivity amounted to
4 actual financial harm to their company, right?

15:41:05 5 A. That's my understanding, yes.

6 Q. And in analyzing this issue, you've reviewed, among
7 other things, the deposition transcript and the trial
8 transcript of Mr. Otto Reidl, correct?

9 A. Yes, I did.

15:41:23 10 Q. We're going to get into this a little bit, but at a
11 high level, can you please just tell us what your
12 understanding is of what Mr. Reidl has done here with
13 this calculation?

14 A. Well, it's changed over time. It's changed several
15 times over time.

16 Originally in his deposition testimony, it
17 was explained in one way. In his direct testimony as I
18 read it, he was explaining that, in fact, the claim was
19 really because there was the decline in what the amount
15:42:00 20 of pounds I think that was shipped by their employees,
21 that they needed to hire additional employees to meet
22 that demand that they had to get out the door.

23 And then on the second day, I guess, or the
24 last part of his testimony, it seemed to change and it
15:42:14 25 was now, "No, I didn't hire additional employees but when

1 through attrition the employees were leaving, instead of
2 not refilling that role and lowering my cost of
3 employment, I went and rehired people and, therefore, I
4 essentially had higher employment or higher employee
15:42:32 5 costs because I didn't -- because I filled those roles
6 back up again."

7 So the higher labor element, the number of
8 employees, led to additional costs during the time period
9 that they were running the Business One software.

15:42:45 10 Q. Thank you, sir. I'd like to show you what we've
11 marked as Exhibit 909.

12 Mr. Hayden, could you give me a hand
13 putting that up for the jury, 909?

14 MR. KELLEHER: Your Honor, may I approach
15:43:00 15 and get the microphone for the witness?

16 THE COURT: Yes.

17 MR. KELLEHER: Okay.

18 BY MR. KELLEHER:

19 Q. So, sir, can you, using this exhibit, explain to
15:43:50 20 the jury how Mr. Reidl determines that he had 27
21 additional workers?

22 A. Yes. What Mr. Reidl did was take the time frame
23 that he --

24 THE COURT: Is that on? Excuse me. Is
15:44:16 25 that on, Sue?

1 MR. KELLEHER: Maybe it just needs to be
2 higher on your lapel or you could just hold it.

3 THE WITNESS: You want me to do it that
4 way?

15:44:28 5 MR. KELLEHER: Whatever you're comfortable
6 with.

7 THE WITNESS: Is that fine?

8 A. Okay. What this exhibit shows is information that
9 comes from the books and records of Hodell, and it shows
10 the years. You can see the years and the years in which
11 what -- what software program was being used, FACTS,
12 which I think has been discussed quite a bit at trial.

13 And then in 2007, it switched over in March
14 to Business One. And in 2008, the entire year, they ran
15 Business One.

16 It shows the gross sales for the company,
17 for each one of those years, off the financial records.
18 It shows the full time employees that come off the
19 financial records that were employed by the company. It
20 shows temporary employees that are employed by the
21 company during those same years. And a column for the
22 total employees, which is an addition of the full-time
23 employees, temporary employees, gave you the total
24 employees.

15:45:21 25 So using this information, my understanding

1 is that Mr. Reidl took the years before Business One was
2 implemented, that would have been 2002, '3, '4, '5, '6
3 and two months of 2007, and he averaged the employees,
4 total employees for those years and then compared that to
15:45:44 5 the amount of employees that were employed during the
6 years that Business One was operated, which would have
7 been nine months for 2007, and twelve months of 2008.

8 And you make that comparison, you can make
9 a difference that there were 27 more employees employed
15:46:04 10 by Hodell during the period during Business One than
11 there were for the average of the five years before that.

12 Q. Thank you, Mr. Osborne. And maybe hold the mic a
13 little lower. I think we're getting some feedback.

14 A. Sorry about that.

15:46:15 15 Q. That sounds better.

16 A. All right.

17 Q. So, sir, you just mentioned that Mr. Reidl, in
18 order to get to this so-called additional employees, he
19 used an averaging technique, is that what you said?

15:46:25 20 A. Yes.

21 Q. Sir, can you explain whether, in your professional
22 opinion as a damages expert, it's appropriate to do the
23 averaging that you just described Mr. Reidl did?

24 A. I'll be glad to.

15:46:37 25 It's not appropriate, and the reason it's

1 not appropriate is that during these years, this business
2 was changing and it was changing as you can see
3 dramatically in the amount of sales and the amount of
4 employees.

15:46:47 5 So to compare an average that includes
6 years which are not comparable to the years in question,
7 which are the business -- Business One years, you get a
8 lower average for those five years when compared to the
9 time period that Business One was operating.

15:47:02 10 So you come up with a higher number of
11 needed employees.

12 But if you were to look at the relevant
13 year, and the relevant year in this situation is the year
14 2006, that's the first -- the last full year with an
15 operation that was most consistent with the years that it
16 was operating under Business One, and you compare the
17 amount of employees for that year to the years during
18 Business One. As you'll see, just as in the comparison
19 of 2006 to 2007, that's only a .6 additional employee,
15:47:17 20 but more importantly, you'll look from a full year to a
21 full year 2006, it's 186.2, and in 2008 it goes down to
22 184.3.

23 You actually have a decline in number of
24 employees when you do the comparison appropriately.

15:47:52 25 It's not relevant to look at years in which

1 business was growing through acquisition, and there's
2 been testimony about a number of acquisitions they were
3 doing during this time period.

4 The business was different, and to lower
15:48:05 5 the estimate to compare to the Business One time period
6 by using those years is inappropriate.

7 Q. Thank you, sir. And just so we're all clear, 2006,
8 that was the last full year that Hodell ran its prior
9 software system known as FACTS, correct?

15:48:23 10 A. That is, right, for the full twelve months.

11 Q. In 2007, they ran FACTS for two months, and then
12 they ran SAP Business One for ten months, right?

13 A. Right. Ten months. I think I misspoke. I think I
14 said nine months but, it's ten months, right.

15:48:38 15 Q. Very good. So from 2006 to 2007, based on Hodell's
16 own business records, did Hodell add any additional
17 employees?

18 A. 2006 to 2007? On an annual comparison, they added
19 less than one employee.

15:48:55 20 Q. Looks like they added on an average --

21 A. .6.

22 Q. Six-tenths of an employee?

23 A. Six-tenths of a employee.

24 Q. That's a lot less than 27?

15:49:06 25 A. That is a lot less than 27, yes.

1 Q. Let's compare 2006 which is the last full year
2 Hodell ran the prior software package against 2008 which
3 is the first full year that Hodell ran Business One,
4 isn't that right?

15:49:21 5 A. It is.

6 Q. How many employees did Hodell actually add from the
7 last full year it ran FACTS, to the first full year it
8 ran Business One?

9 A. It didn't add any employees. It reduced the amount
15:49:38 10 of employees by almost -- by almost two.

11 Q. So, sir, you mentioned earlier that based on your
12 understanding and your reading of the depositions of
13 Mr. Reidl, your reading of Mr. Reidl's trial testimony on
14 the first day, and his trial testimony on the second day,
15:50:04 15 you testified that it was your understanding that his
16 damages theory with respect to lost productivity and
17 these workers, that it's changed over time, is that your
18 understanding?

19 A. That is my understanding.

15:50:16 20 Q. And I think that you said that your understanding
21 of what he's saying today or at least what he said on the
22 second day of his testimony was that what actually
23 happened was that Hodell naturally lost through attrition
24 27 and a half additional employees, and they had to
15:50:37 25 rehire people to make up for that deficit.

1 Is that how you understand what he's saying
2 today?

3 A. Yes. That's my understanding.

4 But keep in mind, that's still in the
15:50:45 5 comparison of the five-year average to the time period
6 that Business One was in operation. It's not a
7 comparison of 1986 to 1980 -- or 2006 to 2007. It's
8 still that five-year average, which is not appropriate.

9 Q. So if, let's assume for the moment, sir, that what
15:51:08 10 Mr. Reidl is now saying is somehow true, notwithstanding
11 this chart that comes from Hodell's own business records,
12 let's assume that what he's saying is actually true, and
13 Hodell had to replace some 27 additional employees.

14 As a professional accountant and as a
15:51:28 15 damages expert, how would you go about determining or
16 proving that allegation?

17 A. Well, it's getting back to the basic records of the
18 business.

19 These are employees. You would go and
15:51:43 20 request the information about who are the employees that
21 were -- were hired for this effort. I want to know their
22 job description, what they're doing to make sure, ensure
23 that it had something to do with the Business One
24 implementation. I want to know their rate of pay, what
15:52:01 25 they're getting paid for what time period. And I want to

1 see a calculation that gives me the names, their, you
2 know, the actual salient information that I need to
3 determine that that is the 27.16 employees, I think is
4 what the number is, is actually supported by the actual
15:52:17 5 documents of the company, that they were actually actual
6 employees and what they were paid so that I could
7 determine whether the amount that's calculated is
8 appropriate.

9 Q. Sir, if you were working for a Plaintiff like
15:52:28 10 Hodell and someone said to you, "We had to replace 27 or
11 so additional or extra employees," you would ask to see
12 the actual documents, what are their names, where do they
13 work, when were they hired, how much did they make, those
14 are the sorts of documents you would ask for?

15:52:44 15 A. Yes. Those are documents that would be kept in the
16 ordinary course of a business like Hodell's, yes.

17 Q. Have you seen any of those documents produced by
18 Hodell?

19 A. I have not seen any of them.

15:52:55 20 Q. Should Hodell have documents like that?

21 MR. LAMBERT: Objection.

22 THE COURT: Overruled.

23 A. I would assume if they hired additional employees,
24 that they would know the employees' names, that they
15:53:06 25 would have information about when they were hired, their

1 job description, and what they were paid, yeah.

2 You can't run a business if you don't know
3 the information about your employees so you can pay them
4 their salaries and pay the taxes on their salaries and
15:53:19 5 everything else. Yeah, you'd have all that information.

6 Q. And again, sir, you've been -- you've been in this
7 case since 2012, right?

8 A. That's right.

9 Q. You have reviewed a lot of documents in this case?

15:53:29 10 A. I have reviewed a lot of documents in this case.

11 Q. And you have never seen the documents that you're
12 talking about?

13 A. I have not seen any document that I just described.

14 Q. Sir, let's focus a little more on this allegation
15:53:46 15 that Hodell somehow incurred additional labor costs
16 because of Business One.

17 I'd like to show you an exhibit. This is
18 actually an exhibit that is a Hodell demonstrative, and
19 it summarizes the information that Hodell has -- that is
15:54:08 20 in Hodell's own financial records.

21 Hey, Wes, do you have that board that we
22 could use?

23 MR. LAMBERT: Absolutely.

24 MR. KELLEHER: Alex, could you go put up
15:54:45 25 another easel?

1 BY MR. KELLEHER:

2 Q. Sir, what is your understanding of what this is?

3 A. My understanding, this is a re-creation or
4 summarization of the actual financial results for Hodell
15:55:07 5 for the years 2002 through the first quarter of 2009.

6 Q. And you understand this to be a demonstrative
7 exhibit or just a demonstrative that Hodell and their
8 attorneys prepared for purposes of this litigation?

9 A. Yes. But you can go and find the actual financial
15:55:26 10 records of the company that displays the same
11 information.

12 Q. And you've reviewed all of those financial records?

13 A. I have.

14 Q. Sir, I want to talk about this document and sort of
15:55:35 15 get into it a little bit, but let me first ask you a
16 higher question.

17 In your professional opinion as an
18 accountant and as a damages expert, did Hodell incur any
19 additional labor costs due to Business One?

15:55:51 20 A. I've seen absolutely no evidence that shows me that
21 Hodell incurred additional labor costs due to Business
22 One.

23 Q. Sir, I'd like you to take a look at the line on
24 there -- well, maybe we should start even at a much
15:56:12 25 higher level.

1 The first line says gross sales, right?

2 A. That's right.

3 Q. Like in one sentence, what is that?

4 A. Those are what all the businesses are trying to do,
15:56:21 5 get customers to pay for their products and this is a
6 representation of the amounts they paid for the product
7 that Hodell has sold them over those years.

8 Q. And in 2008, that's the first full year that Hodell
9 ran Business One, right?

15:56:33 10 A. That is correct.

11 Q. And how much gross sales or revenue do we see here?

12 A. It's a total of \$43,877,103.

13 Q. And how does that compare to every single year
14 prior to it on this exhibit?

15:56:50 15 A. It is the highest amount of all the years.

16 Q. So the first full year, the only full year that
17 Hodell ran the Business One software, they brought in the
18 most amount of money they had ever brought into it before
19 then?

15:57:04 20 A. Their sales were the highest during the one year
21 they operated Business One for a full year.

22 Q. Thank you, sir. And if you look, you see a bunch
23 of other items underneath that.

24 Do you see those?

15:57:15 25 A. I do.

1 Q. And basically, and you please correct me if I've
2 got this wrong, but on a statement like this, you take
3 your top line, which is the gross sales, right?

4 A. That's right.

15:57:23 5 Q. And you subtract things from it as you go along,
6 right?

7 A. You subtract things. Various expenses. Categories
8 of expenses are shown on this financial reporting that
9 detail various aspects of the business that those
10 expenses align to.

11 Q. Sir, I'd like to direct -- thank you, sir. I'd
12 like to direct your attention to the line that says
13 "other cost of sales"?

14 A. Yes.

15:57:48 15 Q. Are you able to just highlight that line?

16 A. It's right here, right under product margin
17 percent.

18 Q. Sir, what is your understanding of what is
19 contained, what sorts of expenses are contained within
15:58:02 20 that line that's called "Other cost of sales"?

21 A. My understanding is that other cost of sales
22 represents the host, really the kind of pure distribution
23 effect, the warehouse cost of the business.

24 This, the beginning of these statements
15:58:17 25 shows sales amount that came in, but this shows you what

1 it cost and the other cost of sales to actually ship that
2 product, to warehouse it and to ship it.

3 Q. So, sir, would that include things like warehouse
4 labor?

15:58:28 5 A. Warehouse labor, the fringes, taxes, and benefits
6 that you pay for those employees for the warehouse, the
7 rent for the warehouse, the other supplies, utilities,
8 anything having to do with the warehouse operations of
9 the business.

15:58:41 10 Q. It also would include the electricity for the
11 warehouse?

12 A. Yes, it would.

13 Q. The heating?

14 A. Yes.

15:58:45 15 Q. If they got an air conditioner, that, too?

16 A. That would be in there, as well.

17 Q. The rent, if they're still paying rent on the
18 building?

19 A. Yes.

15:58:53 20 Q. Sir, are you able to tell anything about whether
21 Hodell actually lost or incurred any additional labor
22 based on looking at -- labor costs based on looking at
23 this line?

24 A. No, well, at this line, you can't see that, that
15:59:09 25 delineation or that level.

1 If you look at the financial information
2 that makes up this number, which Hodell has produced and
3 I have read, it will show you the detail of labor,
4 fringes, utilities, rent, and all those things that are
15:59:23 5 included in the warehouse costs of the business would be
6 detailed in that statement from Hodell.

7 Q. So let me be clear on what you're saying.

8 There's this one line here, it says "Other
9 costs of sale," and then let's just look at 2002, for
15:59:37 10 example. It says \$5,666,492. And what you're saying,
11 and please correct me if I'm wrong, is that on this
12 summary document, you can't see all of the different
13 components that add up to the 5,666 number, but there are
14 more detailed Hodell financial statements that do provide
15:59:59 15 that information?

16 A. Yes. This does not show the detail for the
17 5,666,492, yeah.

18 Q. Yeah, that's important, isn't it?

19 A. It is. I'm nerdy about that stuff as well, so.

16:00:14 20 Q. Well, that's one that I think -- yeah.

21 So back to my point before you corrected
22 me, and thank you for doing that, there's details about
23 what goes into that five million number?

24 A. Certainly. The company, Hodell, like any other
16:00:27 25 company, records expenses in lots of detail, so you know

1 the various totals for rent and employee expense and all
2 those types of things. This reporting is done at a
3 summary level.

4 Q. But you looked at the detail level?

16:00:40 5 A. I did.

6 Q. You looked at Hodell's own documents?

7 A. Yes.

8 Q. That they produced in this litigation?

9 A. I did.

16:00:45 10 Q. Provides that detail?

11 A. Yes, it does.

12 Q. Sir, with that understanding, sir, is it in your
13 professional opinion when looking at this "other cost of
14 sale" line, did Hodell incur any additional labor costs
15 due to Business One?

16 A. Well, when you look at the actual details of labor
17 costs that are included in other cost of sales from 2006,
18 2007 and 2008, the actual labor cost of the warehouse
19 declined, the total, the total amount of labor costs,
16:01:12 20 what they paid their labor, their employees in the
21 warehouse, declined.

22 Q. So, sir, are you saying that the warehouse labor,
23 while they were running Business One, while Hodell was
24 running Business One, actually went down?

16:01:24 25 A. Yes, it did.

1 Q. Sir, I'd like you to take a look at line "sales and
2 administrative expense."

3 Do you see that?

4 A. Yes, it's right over here.

16:01:32 5 Q. And can you tell the jury what's involved in that
6 line?

7 A. That line would account for the non -- usually the
8 nondirect costs. These would be the costs of the
9 executives, the cost of the various departments that are
16:01:48 10 nonoperationally-oriented, things like the accounting
11 department, the human resource department, the IT
12 department, the sales department.

13 Those costs would be captured in that line
14 item entitled "Sales and administration expense."

16:02:07 15 Q. So, sir, what do we see here with respect to sales
16 and administrative overhead costs?

17 A. Well, we see starting in 2004 or actually from 2003
18 to 2004, that those sales as a total category for Hodell
19 started to increase, and that increase became pretty
16:02:26 20 significant and accelerated through the years until you
21 get to 2007.

22 Q. So, sir, you're saying that -- well, let me ask you
23 this question: In 2003, is it your understanding that
24 Hodell wasn't running Business One, right?

16:02:40 25 A. It was not.

1 Q. And, in fact, they didn't start running Business
2 One until March of 2007, right?

3 A. All the way over here, yes.

4 Q. But from 2003 to 2004, Hodell's sales and
16:02:53 5 administrative expenses went up, right?

6 A. They did.

7 Q. And from 2004 to 2005, Hodell's sales and
8 administrative expenses went up again, right?

9 A. It did.

16:03:02 10 Q. And they weren't using Business One then, right?

11 A. They weren't.

12 Q. And from 2005 to 2006, Hodell's sales and
13 administrative expenses went up again, right?

14 A. Yeah. Actually this, at this period, 2005 to 2006,
16:03:15 15 that increase was rather substantial.

16 It's almost a million dollar increase in
17 costs during that time period.

18 Q. Hodell wasn't running Business One then, right?

19 A. They were not.

16:03:25 20 Q. From 2006 to 2007, Hodell's sales and
21 administrative expenses went up again, right?

22 A. It did. Went from 7,089,000 to 7,410,000.

23 Q. And in that period from 2006 to 2007, Hodell didn't
24 start running Business One until 2003 -- excuse
16:03:44 25 me -- March of 2007, right?

1 A. March, 2007, it began to run Business One, as I
2 understand it.

3 Q. So we're seeing a natural or not a natural, but
4 we're seeing an increase, an incline. If you were to
16:03:58 5 plot this out on a graph, you'd see an incline in
6 Hodell's costs of sales and administration over time,
7 right?

8 A. Yes. Starting back, as I said, in 2003, those
9 costs continued to increase.

16:04:13 10 Q. And do you have a sense of what that's attributable
11 to?

12 A. Well, as I understand these businesses, because
13 I've studied and worked with companies like this, this is
14 more -- considered more of a fixed cost to the business.
16:04:25 15 This is one that really has to be managed. Because a lot
16 of the costs up above are tougher to manage. You try to
17 manage what you purchase your product for and your
18 margin. You do the best you can on that. You try to get
19 the best purchase price so you can get the best sales
16:04:38 20 price.

21 But as you move down the financial
22 statement, you get past your normal operations and into
23 sales and administration expense, you're talking about
24 some costs that should remain relatively constant over
16:04:48 25 time. You try to manage it that way so that all the

1 profit you produce up top shows up down at the bottom.
2 You want it to go as they call to the bottom line, right?
3 You want it to flow down there.

4 The only thing keeping those profits from
16:05:01 5 the operation from flowing to the bottom line is that
6 line called "sales and administrative expense." That's
7 the expense you have to manage.

8 But what I see during this time frame, as
9 the company was growing, and I believe it was growing
16:05:12 10 actually through some acquisitions as well, that that
11 line item, that type of expense category was not being
12 managed as well. It was increasing. And that
13 was -- that increase in expense was eating up its profits
14 as you move forward.

16:05:29 15 Q. Sir, you mentioned you have to manage your
16 expenses.

17 When you were talking about that, does that
18 have anything to do in this time period with Business
19 One?

16:05:36 20 A. No. I mean, Business One operating, you want to
21 manage the expenses as well. You want to manage them
22 every single year, but during this time frame, this
23 company was growing and you want the additional profits
24 that you're bringing in to actually come out on the
16:05:52 25 bottom line. To do that, you really have to manage that

1 line item, those sales and administrative expenses.

2 Q. Sir, are there any other reasons why you're unable
3 to attribute the increased sales and administrative
4 overhead to Business One?

16:06:06 5 A. Well, there's -- you look at the salaries, the
6 salaries in that category increased in comparison during
7 those years, '6, '7 and '8. And in those salaries are a
8 whole host of activities. Those departments I mentioned,
9 IT, accounting, sales, but also your executives' salaries
16:06:25 10 are in there, so there's nothing that I've seen that
11 earmarks, identified, listed what specific salaries or
12 costs in there are attributable to Business One and,
13 therefore, could be accumulated to determine what the
14 additional labor costs related to operating Business One
16:06:44 15 were.

16 Those aren't available. I've never seen
17 them. But what I see is that not only labor costs but a
18 lot of the costs increased during that time period as
19 well.

16:06:53 20 Q. And so, sir, last question on this line, sales and
21 administrative.

22 Is it your testimony that Mr. Reidl's
23 salary is included in that?

24 A. Yes, it would be.

16:07:03 25 Q. And his son, Mr. Kevin Reidl, that would be in

1 there?

2 A. Yes. They would be part of the administration side
3 of that description.

4 Q. Thank you. And, sir, you mentioned, you've been
16:07:18 5 talking about the salary information and that sort of
6 thing.

7 You can't see that on this exhibit, right?

8 A. No. This, this is a -- the very high level
9 financial results of the business. It doesn't show any
16:07:30 10 details of the various expense elements that are included
11 in sales and administrative expense, and there's a page
12 of them.

13 Q. But you were able to review the more detailed
14 documents?

16:07:41 15 A. Yes. I saw the statements I believe came from the
16 outside accountants which detailed the expenses in those
17 years.

18 Q. And that's why you're able to say the things you're
19 saying, because you looked at the more detailed
16:07:53 20 documents?

21 A. Yes, I looked at those documents.

22 Q. Thank you, sir. You can come back to the stand and
23 switch gears a little bit here.

24 Do you still have the handheld?

16:08:18 25 A. The microphone?

1 Q. Yeah.

2 A. I put it right up there. Didn't want to leave with
3 it.

4 Q. I didn't want to have any feedback situations.

16:08:26 5 So let's switch gears a little bit, and
6 let's talk about decreased productivity.

7 You understand that Hodell, at a very
8 fundamental level, is saying that somehow because of
9 Business One, they became less productive, right?

16:08:46 10 A. I believe that's their theory, yes.

11 Q. And they're saying because of this supposed
12 decreased productivity, they somehow suffered financial
13 harm, right?

14 A. I believe that's the follow-on assertion, yes.

16:09:00 15 Q. Sir, I want to look at that first part for a
16 minute, that allegation that they've actually become less
17 productive.

18 Do you have an understanding of what metric
19 Hodell uses to say that they became less productive?

16:09:20 20 A. Yes, I do.

21 Q. And can you explain?

22 A. Yes.

23 What I believe Otto Reidl mentioned was
24 that he was looking at the amount of pounds that were
16:09:33 25 shipped, divided by the number of employees that they had

1 employed for the various years. So he's looking at the
2 level of pounds per employee, and when looking at those
3 in his comparison between the years that it was on
4 average operating for under the FACTS software, that was
16:09:52 5 higher productivity for that metric than it was during
6 the time frame they were operating the Business One
7 software.

8 Q. So let me see if I get this right.

9 It's your understanding that when Mr. Reidl
16:10:01 10 says that Hodell became less productive when it ran
11 Business One, what he really means is they shipped less
12 pounds of product per employee while running Business
13 One?

14 A. That in essence is what he's saying, yes.

16:10:15 15 Q. Sir, as a professional accountant and a damages
16 expert, are you able to say whether measuring
17 productivity, based on the pounds of product shipped per
18 employee, is an appropriate measurement for determining
19 whether or not a company has lost productivity?

16:10:34 20 A. Well, in the case of Hodell and the information
21 I've seen, no, it's not an appropriate measure.

22 Q. And can you explain why you believe that?

23 A. Yeah. As I mentioned earlier, when you kind of
24 start to investigate damages that are claimed and the
16:10:48 25 actual documents, you don't look at just a slice of

1 information. You don't just look at 2006, 2007, 2008
2 only.

3 You back up and look at what's happened to
4 the business over time.

16:11:00 5 What Mr. Reidl has done is to take an
6 average of five years before Business One was employed,
7 and he's made a calculation of what the average pounds
8 per employee were, and he's compared that to the time
9 frame that pounds per employee when they were shipping
16:11:22 10 under Business One.

11 Well, the problem with that comparison,
12 there's a couple problems with the comparison. One is
13 the averaging again. But more importantly, if you look
14 at the information, you will see that the pounds per
16:11:32 15 employee by year was dropping. From 2004 on, it dropped
16 every year.

17 So to make a claim that a drop in
18 comparison from pre-Business One to during Business One
19 is a relevant measure, it isn't a relevant measure
16:11:49 20 because the company was declining in that metric for a
21 while. There's been a change in the business. The
22 amount of pounds that were being shipped by employee was
23 going down and it continued to go down while under
24 Business One as well.

16:12:02 25 So it doesn't -- that alone tells me that

1 that's not the right metric to measure productivity or
2 the success of its workforce or the success of the
3 management of the workforce as well. It's not the right
4 measure.

16:12:14 5 Q. And, sir, is it true that heavier products can cost
6 less money?

7 A. Yeah. Sure.

8 Q. Lighter products could cost more money?

9 A. They can. It depends what they're made of, how
16:12:32 10 detailed and what the cost is to make that smaller
11 product, yeah, they can be very different.

12 Q. Is that an additional reason why using a metric, a
13 productivity metric of pounds shipped per employee is not
14 appropriate in your view?

16:12:47 15 A. That's why there's that change. I believe there's
16 a change over the years from 2004 on, that that was
17 declining, because the mix of the products was changing,
18 and it wasn't the same as in the past.

19 And so to look at that metric, it really
16:13:02 20 doesn't help you understand what's going on with the
21 business because at the same time that that decline in
22 pounds by employee was declining, sales were increasing.

23 So that would tell me that there's
24 something wrong with that measure to give me a feeling or
16:13:18 25 understanding of the success of the business.

1 Q. Sir, you mentioned sales, and correct me if I'm
2 wrong, but do you believe that a better and more
3 appropriate metric for determining whether or not Hodell
4 gained or lost productivity would be actual dollars
16:13:38 5 earned per employee?

6 A. Well, the situation dealing with Hodell and the mix
7 of its products, it's apparent to me sales is a much
8 better measure because as I just mentioned, at the time
9 that the pounds per employee were dropping, the sales
16:13:51 10 dollars per employee were increasing.

11 So, yeah, I think sales is a much better
12 measure. If one was to want to determine whether there's
13 been lost productivity, and I don't necessarily believe
14 that that's necessarily the kind of way to step into it,
16:14:03 15 but that's the way Mr. Reidl has done it, I think sales
16 would be a much better measure than pounds shipped.

17 Q. So you're saying as a professional accountant and
18 as a damages expert, you don't look at pounds of product
19 shipped; you look at actual money you get to determine
16:14:19 20 productivity?

21 A. In this situation with these facts, yes, that is
22 the case.

23 Q. Sir, I'd like you to flip your binder and take a
24 look at Exhibit 910 and 911.

16:14:31 25 Alex, can you put these up on the easel?

1 We may use the additional easel now?

2 Mr. Osborne, maybe you want to grab a mic?

3 A. Oh, okay.

4 MR. MILLER: Okay for now? Good.

16:15:27 5 BY MR. KELLEHER:

6 Q. So, sir, could you please explain to the jury what
7 they're looking at?

8 A. Yes. These are two exhibits, exhibits, that have
9 somewhat similar information but there are some specific
16:15:43 10 differences.

11 Both exhibits show year and the actual
12 software that's being utilized during those years as we
13 talked about in the prior exhibit, so you see the years
14 2002 through 2008. Both exhibits show annual gross
16:15:57 15 sales. They're the same for each one of those years.
16 The difference comes during the next listing where this
17 one here talks about total employee population that
18 would -- or total population of only full-time employees,
19 which we could get off the financial records of Hodell.

16:16:18 20 And by dividing the sales by the total full-time
21 employees, you arrive at gross sales per full-time
22 employees on this graph.

23 On this, same information, but now you have
24 a larger number of employees because you not only have
16:16:34 25 full-time employees, but you also have temporary

1 employees, and so the number would be bigger. And you're
2 dividing the same sales number now by a larger employee
3 number to derive gross sales per total employees, both
4 full-time and temporary, and so you have a range of
16:16:49 5 figures over the years, 2002 through 2008, of the gross
6 sales per total employee.

7 Q. So, sir, what does looking at these exhibits that
8 were based off of Hodell's own financial records, what do
9 these exhibits tell you as a professional accountant and
16:17:06 10 damages expert as to whether Hodell suffered any
11 productivity decline while using Business One?

12 A. Well, both analyses say -- tell me that during the
13 one full year that they ran Business One, that their
14 productivity as measured by gross sales by either
16:17:27 15 full-time employees or by all employees, total employees,
16 was the best that they had of all the years.

17 Q. So this, these exhibits show that while Hodell was
18 running Business One, its productivity didn't go down;
19 its productivity went up?

16:17:42 20 A. Yes. By these measures, the productivity went up.

21 Q. And when you talk about these measures, you're
22 talking about actual money that Hodell got per actual
23 employee?

24 A. Yes. This is -- eventually it would be cash, but
16:17:55 25 sales dollars, either in credit but eventually turned to

1 cash. The gross sales that would be earned by the
2 company, divided by the number of employees that are
3 being employed to produce those sales.

4 Q. Thank you, sir.

16:18:06 5 I'd like to show you one final exhibit.

6 Wes, this is one of yours again. It looks
7 like a heartbeat. Looks like this. Can we use that?

8 MR. LAMBERT: I object to the
9 characterization of the exhibit.

16:18:27 10 MR. KELLEHER: Looks like two heartbeats.

11 BY MR. KELLEHER:

12 Q. Sir, do you recognize this exhibit?

13 A. Yes. It was shown to me.

14 Q. This is a Hodell demonstrative that Hodell has
16:18:53 15 actually used at this trial, and looks like it has a blue
16 line that shows gross profit over time and a red line
17 that shows profit before tax over time.

18 Do you see that?

19 A. I do.

16:19:04 20 Q. And you understand that Mr. Reidl and Hodell say
21 that the most important financial metric to Hodell is
22 profits before tax?

23 A. I believe that was his testimony, yes.

24 Q. As a professional accountant and damages expert, do
16:19:21 25 you agree with that?

1 A. Not for the measure on damages, it's not, no.

2 It may be important to Mr. Reidl as an
3 executive who receives some benefit or remuneration off
4 the profits, the bottom line profits of the company, but
16:19:35 5 as to damages, that's not the measure that I would look
6 to or consider.

7 Q. And why not?

8 A. Well, product before tax includes nonoperational
9 items, things that don't -- don't pertain to the
16:19:48 10 operations of the business, what we have in accounting
11 parlance the other income, other expenses, things that
12 they could -- they win an award or they have to pay a
13 penalty tax to somebody for, you know, real estate or
14 something like that. It includes interest which is
16:20:03 15 nonoperational as well.

16 So if you really want to get a pulse of how
17 the business operates and what a business analyst like
18 myself and other people do is they look at operating
19 profit. That's the better line which you really get a
16:20:17 20 sense of what the business is doing.

21 This doesn't look at that. It looks at
22 gross profit which is further above the line of operating
23 profit, but then it looks at profit before tax, which I
24 believe the graph is trying to show some separation of
16:20:26 25 those two lines.

1 Q. Sir, in your professional opinion as an accountant
2 and as a damages expert, does this chart that Hodell
3 made, does this show any damages from lost productivity
4 that are attributable to Business One?

16:20:42 5 A. It doesn't demonstrate any damages whatsoever from
6 any of the categories that I understand have been
7 claimed.

8 I mean, it's merely a graphing of points in
9 time for an annual period and for one quarter period,
16:20:58 10 demonstrate a difference between two lines, two amounts
11 of measurement of income for the company.

12 Q. Sir, do you know who at Hodell actually made this
13 thing?

14 A. I don't know who at Hodell.

16:21:12 15 I know Mr. Reidl testified to it, but I'm
16 not sure who actually prepared it.

17 Q. But you don't know who actually made it, right?

18 A. I don't.

19 Q. Are there any other things about this, the way this
16:21:22 20 exhibit was constructed, that you find to be wrong as a
21 professional accountant?

22 A. Well, I find it surprising and I find it misleading
23 a bit that you have a different measurement line for
24 profit before tax than you do for gross profit.

16:21:40 25 If you see these, these are million dollar

1 increments for gross profit, and over here for net profit
2 you have only \$200,000 increments. So a change, a
3 smaller change for profit before tax is going to be a
4 much larger change on a graph.

16:21:54 5 You would normally, to do a graph like this
6 to show the relationship between lines, they would be
7 based on the same indicators on the side. You would do
8 it all based on that. If you did that, you'd see a
9 different relationship between these lines.

16:22:07 10 Q. So let me stop you right there and slow it down for
11 just a minute.

12 Let's look at the Y axis on the left there.
13 It says "gross profit," do you see that?

14 A. I do.

16:22:15 15 Q. And you mentioned intervals, right?

16 A. Yes.

17 Q. And what you mentioned was that there's a
18 \$1 million interval in between these lines, right?

19 A. There is.

16:22:24 20 Q. So it goes from one million at the bottom to two
21 million, to three million, to four million. Each time it
22 goes up by one million?

23 A. That's right.

24 Q. And that's what you meant by the interval, right?

16:22:36 25 A. Right.

1 Q. And if we look at the column on the right-hand
2 side, we see that that, those numbers don't increase by a
3 million, right?

4 A. No, they don't. They increase only by 200,000.

16:22:46 5 Q. And so that's the interval on the right-hand side,
6 right?

7 A. It is.

8 Q. And what you're saying is that if you had made a
9 chart like this, you would make both of the intervals the
16:22:57 10 same?

11 A. Right. Because then you would see the comparison
12 or the comparative would be -- would be consistent.

13 Q. And what would happen if you equalized the
14 intervals on those two columns?

16:23:07 15 A. Well, this, what appears to be a much more
16 egregious change in profit before tax wouldn't be as big
17 a change.

18 Q. So that red line and that blue line, if you
19 actually did the intervals right, they would come much
16:23:22 20 closer together?

21 A. Well, they would -- they would be apart on the
22 graph, but the change from year-to-year wouldn't look as
23 exaggerated.

24 Q. Is there anything else about this chart and the way
16:23:33 25 it was prepared that strikes you as improper or not done

1 correctly?

2 A. Well, there are two, two issues about the graph
3 that concern me.

4 One is that it's incomplete, the
16:23:45 5 information. We have information that goes all the way
6 back to 2002. And what I've seen consistently in any of
7 the information that's done by Hodell is they have a
8 tendency to look at only two years or three years.
9 That's what they want you to focus on.

16:24:00 10 The reality is you need to look at what was
11 going on in the business for a longer period of time to
12 see whether there were changes, as I mentioned earlier,
13 like expenses. Were expenses already going up in those
14 earlier years?

16:24:12 15 So if you're only looking at the time
16 period of three years and say, well, it went up in those
17 years, well, it already went up in the earlier years.
18 Back here, you don't see what happened in the earlier
19 years before 2004.

16:24:21 20 And, in fact, if you had graphed those,
21 those numbers were down further. They started down
22 below. And like a lot of companies, profits go up and go
23 down, depending on market conditions, competition, and
24 everything else.

16:24:31 25 The other part that's misleading as well,

1 which I would never do on a graph, is that you would plot
2 points that were annual periods and then you would plot a
3 one quarter period. The reality is if you had plotted
4 the other two years, which are, that information is
16:24:49 5 available, when Business One was not in play, the company
6 lost a significant amount of money when it was on Profit
7 21. That's not graphed here. You only graphed one
8 quarter.

9 I think to get a better picture on a graph
16:25:00 10 of the reality of the information for the company, you
11 should plot all the information and you should plot it on
12 indices that are consistent between the two lines.

13 Q. Thank you, sir. You can have a seat.

14 Alex, you can take that down.

16:25:28 15 So, sir, just to round out, we've been
16 talking about lost productivity for a while now, alleged
17 lost productivity.

18 My question for you is simple: As a
19 damages expert and as a professional accountant and
16:25:47 20 forensic accountant, how much -- how many -- how much
21 damages in your professional opinion did Hodell suffer
22 because of this alleged productivity, if any?

23 A. I've seen no evidence that there was any damage due
24 to lost productivity at Hodell due to Business One.

16:26:08 25 Q. So that would be a zero?

1 A. That would be a zero.

2 MR. KELLEHER: Judge, I have about ten more
3 minutes left. Could we just keep plugging along?

4 THE COURT: You want to finish in ten
16:26:21 5 minutes?

6 MR. KELLEHER: I'd like to.

7 THE COURT: Okay.

8 MR. KELLEHER: That would bring us to 4:35,
9 and I just didn't know if that was appropriate.

16:26:27 10 THE COURT: Yeah.

11 BY MR. KELLEHER:

12 Q. Sir, you understand -- and we're going to change
13 gears again now, okay?

14 A. Okay. Changing gears a lot. Okay.

16:26:34 15 Q. Yeah, I know. Got a lot of gears.

16 Okay. And I want to take a step back and
17 sort of look at Hodell's damages claim as you understand
18 it at a pretty big picture level, all right?

19 A. All right.

16:26:45 20 Q. And we've been through this a couple of times, but
21 just so we're all on the same page, it's your
22 understanding that Hodell is saying that it suffered
23 damages while it was running Business One, right?

24 A. That's my understanding of their assertion, yes.

16:26:59 25 Q. And it's further your assertion that Hodell is

1 claiming that it lost -- that it suffered damages because
2 of Business One, right?

3 A. That's what I understand their claim is.

4 Q. Is causation, and by causation I mean that because
16:27:20 5 of, okay, is causation something that a professional
6 forensic accountant, such as yourself, looks at when
7 coming to opinions as to potential damages?

8 A. You certainly have to consider causation, sure.

9 Q. And why is that?

16:27:36 10 A. Well, because if a claim is made that, a simple
11 example, that I walk out one morning and I see that
12 there's damage to my car, and I immediately assume that
13 it was caused by someone running into my car the other
14 day, whatever, without understanding that, oh, no, maybe
16:27:58 15 it was a tree that fell on it, maybe somebody rode into
16 it on a bike, it's best to understand what caused the
17 damage before one has to go determine what the measure
18 would be, how to quantify it and everything.

19 You really do need to understand the
16:28:13 20 causation effects before you start into the investigation
21 of measuring, quantifying damages, and supporting the
22 damages.

23 Q. So, sir, you mentioned that you have a methodology
24 that you apply when you are -- have been retained by a
16:28:26 25 plaintiff or by a defendant.

1 Is looking at or isolating the cause or the
2 alleged causes of alleged damages, is that something that
3 you are used to doing?

4 A. Yeah. Yes, it is.

16:28:41 5 Q. How do you do it?

6 A. Actually in our -- in my practice and in other
7 people that I know practice well in forensics, something
8 we think about is a term called "disaggregation." And
9 it's a term of our art, what we do. And it's a thought
16:28:58 10 that you really need to think about, for example, in this
11 case, that something happened during the time that
12 Business One was operating, and I'm going to say
13 hypothetically because I haven't seen any evidence of
14 this, but let's say the janitorial costs went up in
16:29:16 15 business -- during the Business One and it's claimed that
16 those janitorial costs went up because of the operation
17 of Business One.

18 Well, if one doesn't consider anything else
19 that could have possibly happened during the time that
16:29:26 20 Business One operated or before it operated or after it
21 operated, then you're left with a decision that, well, it
22 must have been solely the reason of Business One that my
23 janitorial costs went up.

24 But if one was to stand back and
16:29:40 25 disaggregate, that is to think about other things that

1 might have happened during that time frame, that maybe we
2 had a different contract for janitorial service before we
3 went into Business One and their contract was \$4,000 a
4 month, and during that time period, the new contract or
16:29:54 5 the new supplier, the new janitorial service, it went up
6 \$2,000 a month. Nothing to do with Business One, but
7 there was a change in the contract or change in the type
8 of expense or the change in the efforts.

9 We have to do that in what we -- how we do
16:30:09 10 our analysis. We have to find the other items that are
11 affecting the costs and the revenues, and separate them
12 to determine, okay, what really happened because of just
13 Business One.

14 And, unfortunately, my analysis of what's
16:30:24 15 been done by Hodell is everything is caused by Business
16 One. You know, the problems of my interest, the problems
17 of whatever are caused by Business One, with no attempt
18 to look at other items that could have been going on that
19 have caused those increases.

16:30:38 20 And there are many. There's competition.
21 There's the economy, very relevant during the time period
22 of this analysis because United States economy was going
23 into the worst recession since the Great Depression.
24 Okay. No consideration about that.

16:30:51 25 No consideration about competition, about

1 other aspects of the business, management of the
2 business, the skills of the employees.

3 You need to think about all those and try
4 to separate the effects of those items from what is
16:31:05 5 believed to be the effects of the software.

6 Q. And, sir, it's your -- is it your understanding
7 that Hodell did any of that? Did they separate the
8 causes or try to?

9 A. I didn't see any evidence in the discussions, in
16:31:18 10 the depositions, or in the trial testimony, that anybody
11 looked outside the box.

12 It was started with the assertion it was
13 caused by Business One, and here's the number.

14 Q. Hodell ran Business One from March of 2007 until
16:31:31 15 March of 2009, right?

16 A. That's my understanding, yes.

17 Q. And you mentioned an economic situation, and I
18 think everyone knows what you're talking about, but can
19 you be specific, like, is that when it happened and what
16:31:42 20 happened?

21 A. Well, the decline in the U.S. economy started in
22 2007, really got the deep effect into 2009, but during
23 that time frame, you had the construction industry was
24 coming to a standstill, you had banks that were no longer
16:31:56 25 lending because their credit was getting really squeezed

1 by what was happening in the credit markets. I mean, we
2 all know what was going on.

3 It put a bit of a melt down in the United
4 States economy and the world economy. That was something
16:32:07 5 that was happening during this time frame.

6 Q. And did Hodell account for that when it claims its
7 damages were caused by Business One?

8 A. I saw no mention that they considered it when they
9 calculated any of their damages. The only consideration
16:32:21 10 I saw was an admission that their business was starting
11 to be affected in 2009 because of the economy.

12 Q. Thank you, sir. And let's wrap it up.

13 I want you to engage in a hypothetical for
14 me, okay?

16:32:46 15 A. Okay.

16 Q. I want you to assume, again, I want you to assume,
17 that SAP is found liable in this case. And so all I want
18 you to do is to give me your opinion that if that
19 is -- if that's true, what damages Hodell suffered.

16:33:05 20 A. I haven't seen any evidence of damages that they
21 suffered due to Business One.

22 Q. So let's break it down.

23 Assuming that hypothetical, how much
24 damages, if any, did Hodell suffer because of lost sales?

16:33:26 25 A. Zero. There were no lost sales.

1 Q. How many damages did Hodell suffer because of lost
2 customers?

3 A. There was no evidence of any lost customers so the
4 answer would be zero.

16:33:37 5 Q. How much damages did Hodell suffer because of lost
6 orders?

7 A. That would be zero as well.

8 Q. How much damages did Hodell suffer because of
9 training costs?

16:33:48 10 A. I saw no evidence to support increased training
11 costs due to B1, so the answer would be zero.

12 Q. How much damages did Hodell suffer because of
13 alleged increases in interest?

14 A. The answer would be zero. There's no evidence to
16:34:03 15 that at all.

16 Q. How much damages did Hodell suffer because of
17 alleged failure to recoup a return on investment?

18 A. As I mentioned earlier, that's -- that would be
19 duplication or a doubling up, so that answer is zero as
16:34:17 20 well.

21 Q. How much damages did Hodell suffer in your
22 professional opinion, if any, as a result of alleged
23 decreased productivity?

24 A. That answer would be zero as well.

16:34:31 25 Q. How much damages, if any, did Hodell suffer because

1 of Business One in terms of out-of-pocket costs?

2 A. I haven't seen the evidence, sufficient evidence,
3 to tell me that there was a loss because of out-of-pocket
4 costs.

16:34:48 5 I think there's some inference that there
6 was amounts paid potentially to SAP, but I've seen no
7 calculation as to whether that should be apportioned or
8 allocated or anything else, so the amounts that have been
9 claimed certainly aren't right and don't, as I can tell,
16:35:04 10 align themselves with anything to do with Business One.

11 Q. And how much money do you understand SAP actually
12 received on this entire engagement with Hodell?

13 A. I understand only from some testimony that it was
14 around \$150,000.

16:35:18 15 Q. And Hodell actually ran the Business One software
16 for two years, right?

17 A. That's right.

18 Q. And in your view, in your professional opinion,
19 what effect, if any, does that have on that 150,000
16:35:30 20 number?

21 A. Well, SAP would have, I believe should be allocated
22 some amount of that revenue for the time period that it
23 was operated because they used the software so they
24 should be paid for it.

16:35:42 25 MR. KELLEHER: Thank you, Judge.

1 No further questions at this time.

2 THE COURT: Thank you.

3 Okay, folks. We'll adjourn for the
4 evening. We're getting near that point where we're
16:35:50 5 nearing the end. So get a good night's rest. Keep in
6 mind the admonition. You've heard a lot of the
7 testimony. You haven't heard it all. You don't know
8 what the arguments of the lawyers are and you certainly
9 don't know what the law is that applies to the case. So
16:36:04 10 you still maintain your open mind and don't form or
11 express any opinion about your ultimate decision.

12 Have a good evening. We'll see you 8:15,
13 same place.

14 (Jury out)

16:44:36 15 (Proceedings adjourned at 4:44 p.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Susan Trischan

/S/ Susan Trischan, Official Court Reporter
Certified Realtime Reporter

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I N D E X**WITNESSES:****PAGE**

DIRECT EXAMINATION OF BROOKS HILLIARD

2469

BY MR. STAR

CROSS-EXAMINATION OF BROOKS HILLIARD

2549

BY MR. LAMBERT

CROSS-EXAMINATION OF BROOKS HILLIARD (RESUMED)

2561

BY MR. LAMBERT

DIRECT EXAMINATION OF GEOFFREY OSBORNE

2593

BY MR. KELLEHER

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